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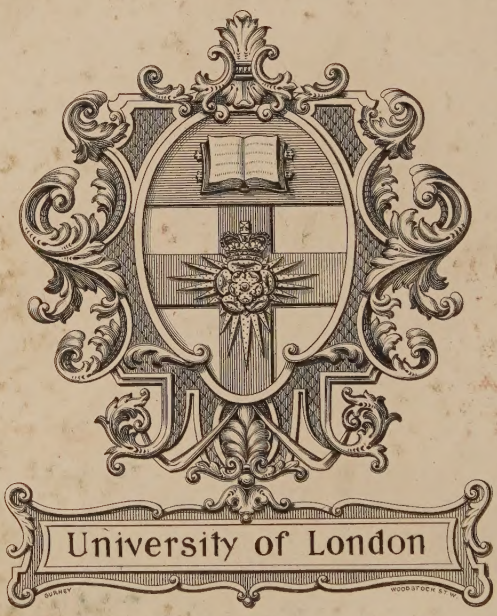
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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

CHRISTY *v.* TIPPER.

C. A.
1904
Nov. 14.

[1903 C. 1015.]

Trade-mark—Registration—Invented Word—"Absorbine"—Patents, Designs, and Trade Marks Acts, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *and* 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 1.

The word "Absorbine," as applied to a veterinary preparation for absorbing and removing swellings,

Held (affirming Joyce J., [1904] 1 Ch. 696), to be a mere variation of an existing English word, and therefore not an "invented word" capable of registration.

APPEAL from Joyce J. (1)

The sole question raised on the appeal was whether the word "Absorbine," as applied to a chemical preparation, was an "invented word" capable of registration as a trade-mark under s. 64, sub-s. 1 (*d*), of the Patents, Designs, and Trade Marks Acts, 1883 (46 & 47 Vict. c. 57) and 1888 (51 & 52 Vict. c. 50), s. 10, sub-s. 1. The facts are sufficiently stated in the report below.

Joyce J. held that the word was not capable of registration as an "invented word."

The plaintiffs, the proprietors of the trade-mark, appealed.

The appeal was heard on November 14, 1904.

Neville, K.C., and *Sebastian*, for the plaintiffs. "Absorbine" is an "invented word" within the substituted s. 64, sub-s. 1 (*d*),

(1) [1904] 1 Ch. 696.

C. A. 1904 CHRISTY v. TIPPER.

of the Act of 1883: *Eastman Photographic Materials Co.* v. *Comptroller-General* (1), the "Solio" case.

[VAUGHAN WILLIAMS L.J. "Absorbine" is only a variation of the English word "absorbing." They both play the same air—the same tune.]

"Absorbine" is a different word: it has no meaning unless you apply it. "Satinine" has been held to be a good "invented word"; also "Tabloid" is a distinctive "fancy word": *In re Burroughs, Wellcome & Co.'s Trade-marks.* (2) "Absorbine" cannot, as an article of commerce, infringe any one's rights—that is the true test—whereas "absorbing" can be used by anybody without interference. "Absorbine" has, no doubt, reference to the absorbent quality of the article, but it does not trespass on the usual vocabulary of the English language. The use of the word is not taking anything from the public they do not already possess. The practice now adopted in the comptroller's office pursuant to directions under s. 95 of the Act is to allow the registration of such words as this, following the *Solio Case*(1); and upon principle, the settled practice of the office ought not to be upset.

[ROMER L.J. Each word must be taken on its own merits. I do not think this case should be decided as one of principle at all.]

In the Report of the Departmental Committee of the Board of Trade (Sebastian on Trade Marks, 4th ed. p. 556), it is stated that there can be no objection to permitting the registration of an invented word not found in the language of our own or some other country, and that even existing words may with advantage be permitted as trade-marks subject to obvious limitations. "Absorbine" is a word which any one would recognise as a novelty.

Younger, K.C., and *E. P. Hewitt*, for the defendants, and *R. J. Parker*, for the Comptroller-General, were not called upon.

VAUGHAN WILLIAMS L.J. I do not think we shall deprive the trade of any advantage on which they have counted from

(1) [1898] A. C. 571. (2) [1904] 1 Ch. 736.

legislation by holding that this word "Absorbine" is not an invented word. In each case one must look at the word itself and decide whether it is an invented word or not.

In my opinion "Absorbine" is a mere variation of the word "absorb," and is used in precisely the same sense, and with the intention of indicating that this preparation which the plaintiffs sell does absorb and effects its cure by absorbing. I do not say that, if it were an invented word and we could find our way to hold that it was a word derived from some other word, that would be sufficient to prevent our saying that it was an invented word. We have not to decide that. In the present case I am of opinion that there is no invention whatsoever in this word "Absorbine."

I may mention that, so far as the "Solio" case is concerned, that case is obviously different from the present. "Solio" may have been derived from "Sol," but there is no word in the English language of which one could say that "Solio" was a mere variation.

Under the circumstances I think that the judgment of Joyce J. is absolutely right, and the appeal must be dismissed with costs.

ROMER L.J. I agree.

COZENS-HARDY L.J. I agree.

Solicitors: *L. E. Townroe; Belfrage & Co., for T. W. Robinson, Birmingham; Solicitor to the Board of Trade.*

G. I. F. C.

KEKEWICH J.

1904.

Nov. 3.

In re BLAND'S SETTLEMENT. BLAND *v.* PERKIN.

[1904 B. 3122.]

Marriage Settlement—Covenant to settle Wife's After-Acquired Property—Construction—"Become entitled"—Vesting in Interest—Vesting in Possession—Property vested in Wife in Reversion before Marriage and falling into Possession during Coverture.

By a marriage settlement made since the coming into operation of the Married Women's Property Act, 1882, it was agreed and declared that all property to which the wife during her then intended coverture should "become entitled" should be vested in the trustees of the settlement upon trust for sale and conversion, subject to a proviso forbidding the trustees to sell any property of a reversionary nature during the lives of the husband and wife without their consent:—

Held, that property to which the wife was entitled in reversion at the date of the marriage would not, in the event of its falling into possession during the coverture, be included in the covenant.

In re Clinton's Trust, (1872) L. R. 13 Eq. 295, discussed.

ADJOURNED SUMMONS.

By a settlement dated January 15, 1895, and made in contemplation of the marriage of Oscar Theobald Bland with the plaintiff, then Miss Susannah Haworth Peel, certain funds were brought into settlement by the husband, and the settlement contained the following covenant as to the wife's after-acquired property:—

"It is hereby agreed and declared that" (subject to an exception not material to be mentioned) "all property to which the wife during her now intended coverture shall become entitled shall as soon as circumstances will permit and at the cost of such property be vested in the trustees" upon trust (subject to a special trust as to annuities) for sale and conversion, but subject to the following proviso: "Provided always that the trustees shall not during the life of the husband or the wife sell or convert into money any real or personal property of a reversionary nature without the consent in writing of the husband and the wife or the survivor of them." The settlement then directed the trustees to invest the moneys produced

by the sale and conversion above referred to, and to hold the same upon the trusts therein mentioned.

At the date of her marriage settlement the plaintiff was entitled under the will of Philip Cazenove, who died in January, 1880, to a reversionary interest expectant on the death of her mother, Mrs. Peel, in a share of the testator's residuary estate; and she was also entitled under an irrevocable deed of appointment executed by her father and mother, Mr. and Mrs. Peel, on February 21, 1894, in pursuance of the powers of their marriage settlement, to a reversionary interest expectant on the death of the survivor of her father and mother in a share of the funds of the settlement.

The plaintiff's father and mother were still living.

The plaintiff, being desirous of selling her reversionary interest under the will, took out this summons against the trustees of her marriage settlement to determine whether the above-mentioned interests would, in the event of their falling into possession during the coverture, be bound by her marriage settlement.

O. L. Clare, for the plaintiff. There is nothing in this covenant to catch a reversionary interest to which the wife was entitled at the date of her marriage, whether it falls into possession during the coverture or not. The words are, "shall become entitled." Those words do not include existing interests, and the only question is whether they mean "entitled in point of title" or "entitled in enjoyment." It is submitted that those words point to a change in title, and not to a change in enjoyment: *Wilton* v. *Colvin* (1); *Wilcox* v. *Smith* (2); *Atcherley* v. *Du Moulin* (3); *In re Pedder's Settlement Trusts* (4); and that this is the true meaning is clear from the proviso as to the sale of reversionary interests. That shews that the covenant was intended to apply to property acquired as a reversion during the coverture. *In re Clinton's Trust* (5) may be relied on by the defendants; but that case is distinguishable, (1.) because there the marriage took place before the

(1) (1856) 3 Drew. 617.
(2) (1857) 4 Drew. 40, 51.
(3) (1855) 2 K. & J. 186.
(4) (1870) L. R. 10 Eq. 585.
(5) L. R. 13 Eq. 295.

KEKEWICH J.
1904
BLAND'S SETTLEMENT, *In re.*
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Married Women's Property Act, 1882, and the Court was influenced by the consideration that the object of the covenant was to exclude the right of the husband over the wife's property; (2.) because the language of the covenant in this case negatives the construction that it refers to a change in enjoyment.

Further, whichever be the right construction of this covenant it does not bind these interests, since they are still reversionary, and therefore the wife can give a good title to a purchaser.

Errington, for the defendants. The words of the covenant are wide enough to include any change of interest during the coverture, and include property to which the wife is entitled in reversion at the date of the marriage if it falls into possession during the coverture: *In re Clinton's Trust* (1); *Blythe* v. *Granville*. (2)

[KEKEWICH J. In *Blythe* v. *Granville* (2) Shadwell V.-C. based his decision upon the ground that the marriage conferred a new title to property to which the wife was already entitled. I cannot follow that reasoning.]

That reasoning has been criticised by Kindersley V.-C. in *Wilton* v. *Colvin* (3) and in *Archer* v. *Kelly* (4); but in the latter case, which is also in point in this case, he expressly recognises *Blythe* v. *Granville* (2) as an authority, and follows it. The cases cited on behalf of the plaintiff do not conflict with my contention, because in those cases there was no change of interest during the coverture. The proviso in this covenant does not cut down the generality of the preceding words; it only shews that those words which would clearly include an interest falling into possession during the coverture also include a reversionary interest acquired during the coverture. It does not restrict, but adds to the covenant. No doubt in *In re Clinton's Trust* (1) Wickens V.-C. suggests that the words cannot include both; but he does not say why, and there does not appear to be any sound reason for that dictum.

Assuming that the covenant embraces the interests in

(1) L. R. 13 Eq. 295.
(2) (1842) 13 Sim. 190, 195; 60 R. R. 319.
(3) 3 Drew. 617, 625.
(4) (1860) 1 Dr. & Sm. 300, 308.

question upon their falling into possession during the coverture a purchaser can be in no better position than the wife. He can only take subject to that contingency.

O. L. Clare, in reply.

KEKEWICH J. Notwithstanding the period of upwards of thirty years which has elapsed since the decision of Wickens V.-C. in *In re Clinton's Trust* (1), and notwithstanding the fact that during that period these covenants have been in constant use and are to be found in various forms in various books, and have been carefully considered by conveyancers, and have also been the subject of many decisions in the Courts, I think it may not unfairly be said that the remark of the Vice-Chancellor in that case, that the law was in a very embarrassing state, is still as true to-day as it was then. Probably the embarrassment arises from the great variety of language and some variety in the circumstances to be found in the marriage settlements which have to be construed, and I think also one is bound to remember that in the meantime the position of a married woman has been materially changed by the Legislature as regards property, and that in changing her position that of the husband has also been affected. That must be taken into consideration in considering covenants of this kind. But it seems to me that certain points are fairly well settled. In *Blythe* v. *Granville* (2) Shadwell V.-C. in the course of the argument said: "The words 'become entitled' mean 'become entitled either in possession or in reversion.'" Probably something to the same effect might be found in other judgments, and perhaps even in some of those to which I have been referred to-day; but I take it that there is no doubt about it, and that when these words "become entitled" occur in a covenant of this kind you necessarily read in the words "in possession or in reversion," notwithstanding that they are not written out in fact. In the present covenant the words "in possession or in reversion" are to be read in after "become entitled." These words are words of futurity: about that there can be no question. That is as clear as in the case of *In re*

(1) L. R. 13 Eq. 295. (2) 13 Sim. 190, 195; 60 R. R. 319.

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Pedder's Settlement Trusts (1) before James V.-C. Nothing to which the wife was entitled at the date of the marriage could possibly be brought in; and I confess that I cannot for a moment think that the wife can be regarded as becoming entitled on her coverture in any different way or in any different character to property to which she was entitled in possession immediately before her marriage. The Vice-Chancellor in *Blythe* v. *Granville* (2) seems to have found a certain amount of futurity in the marriage itself. Kindersley V.-C. in *Archer* v. *Kelly* (3) did not appreciate that reasoning, and I do not appreciate it. We are dealing here with something to which the wife is entitled in reversion at the date of the marriage, and which may fall into possession before the termination of the coverture. Before going further, it is important to observe that there is a proviso in this very agreement concerning the duty of the trustees as regards property of a reversionary nature brought into settlement under this covenant. Therefore, quite apart from the point to which I have referred as to the meaning of "become entitled," the parties to this covenant clearly contemplated that the wife might during the coverture become entitled to property in reversion which would be bound. They were looking to her becoming entitled in interest. The facts which I have to deal with raise the question in this way. The lady was at the time of her marriage entitled to property in reversion, and is still so entitled. That property clearly could not be covered by this covenant, because, as I have said, the words are words of futurity, and the reversion is not included in the settlement, and the proviso to which I have referred does not apply to property to which she was then entitled in reversion, but applies only to property to which she would become entitled in reversion during the coverture. But it may be that during the coverture she will become entitled in possession to that to which at the time of the marriage she was entitled in reversion, and it is said on behalf of the trustees that if she does so become entitled in possession that property will come within the covenant and must be brought into settlement.

(1) L. R. 10 Eq. 585. (2) 13 Sim. 190; 60 R. R. 319.
(3) 1 Dr. & Sm. 300, 308.

Now in order to do that I must hold that "become entitled" not only means become entitled in interest, but become entitled in possession. If I am right in what I have already said, it certainly means become entitled in interest; but in order to accede to the trustees' argument I must go further, and say that it means both become entitled in interest and also as a separate event become entitled in possession. I venture to say that there is no form of covenant in a marriage settlement framed in that way. We may hereafter find conveyancers dealing with that; but it is not the practice of conveyancers in framing these covenants to distinguish between interest and possession. The very point occurred to Wickens V.-C. in *In re Clinton's Trust* (1), and he put it in this way. He said: "The expression 'become entitled to'"—which he had defined in the passage immediately preceding this—"in these and most covenants of the sort applies, I conceive, only to an acquisition of interest by the wife, and this may mean an acquisition of property in which the wife had no interest at the time of marriage, and which vests in her absolutely during the coverture—or an acquisition of property which she was entitled to in remainder at the time of marriage, and which vests in possession during the coverture—or an acquisition of property in which she had no interest at the time of the marriage, which vests in her by way of future title during the coverture, but does not vest in possession till it is determined." Then he goes on to say: "There can be no doubt that the first of these three classes is within the covenant; the difficulty arises with regard to the other two classes. Both of them cannot be included in the covenant, and the question is, which of them is, primâ facie, to be considered as so included." He does not give any reason why both cannot be included in the covenant, but he pronounces his judicial opinion that both cannot be included. I respectfully agree. I do not think that both classes can be included in the words which we have here—"become entitled." The Vice-Chancellor asked the question which of them is to be included, but unfortunately he does not answer it directly, and counsel were unable to refer

(1) L. R. 13 Eq. 295, 305.

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me to any authority upon the point. I have therefore to answer the question so far as I can without the assistance of any authority on this particular point, although the authorities to which I have been referred all have some bearing upon it. To my mind the primâ facie meaning of these words is entitled in interest and not in possession. There is no difficulty in holding that these words mean entitled in possession where the context points to that conclusion, or even where that conclusion is more consistent with all the circumstances than the other; but here I have to consider whether the words can mean both, because certainly they mean entitled in interest. That is clear from the proviso relating to reversionary property. Are those words also to cover what the wife acquires in possession? Being of opinion that the words "become entitled" cannot have both meanings, in the absence of express words to that effect, and that they certainly bear the meaning which I have stated, it follows that I must hold that the other meaning is excluded. I am therefore of opinion that this lady will not "become entitled" to property to which she was entitled in reversion at the date of the marriage, even though it falls into possession during the coverture. That is the best conclusion I can come to upon the covenant. The other question argued on behalf of the plaintiff depends on the general law and does not touch this point. That being so, it is unnecessary for me to decide whether, if the lady's interest would be covered by the covenant upon its falling into possession during the coverture, she could defeat the trustees' title by assigning her interest while it was still in reversion. I only desire to say that that argument does not commend itself to my mind. I am not inclined to countenance that view, which, as at present advised, seems to me to be erroneous.

Solicitors: *W. F. Foster; Upperton & Co.*

H. B. H.

KEKEWICH J.

1904

Nov. 8.

In re CRAWFORD'S SETTLEMENT. COOKE *v.* GIBSON.

[1904 C. 2224.]

Settlement — Construction — Trust for Wife if she shall "survive" her "Coverture"—Determination of Coverture by Decree for Dissolution of Marriage.

By a marriage settlement the father of the wife covenanted that his executors after his death should pay to the trustees of the settlement the sum of 10,000*l.*, which was to be held, in the event, which happened, of there being no issue of the marriage, in trust for the wife, her executors, administrators, and assigns, "if she shall survive her now intended coverture, but if she shall die during her now intended coverture" then in trust for the father, his executors, administrators, and assigns.

The marriage was dissolved by decree absolute on the petition of the husband. Both the spouses were living. The father had died:—

Held, that the words "survive her now intended coverture" could not be read as equivalent to "survive her husband," and that as the coverture had determined by the divorce the lady had "survived" the coverture, and was, therefore, absolutely entitled to the 10,000*l.*

ADJOURNED SUMMONS.

By an indenture of settlement dated July 26, 1881, made on the marriage of Donald Crawford and the defendant Virginia Mary Smith, funds were brought into settlement on the part of each of the contracting parties, and T. E. Smith, the father of Virginia Mary Smith, covenanted that his executors or administrators should within twelve calendar months after his death, in case Donald Crawford and Virginia Mary Smith, or either of them, or any issue of the marriage, should be living at his death, pay to the trustees of the settlement the sum of 10,000*l.*, with interest from the day of his death to the day of actual payment, and it was thereby declared that the trustees should stand possessed of all the trust funds in trust during the joint lives of the husband and wife to pay the income thereof to the wife for her sole and separate use, and after the decease of either to pay the income to the survivor during his or her life, and after the decease of such survivor upon trusts for the children of the marriage, and it was

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thereby agreed and declared that in default of issue the trustees should stand possessed of the trust funds and the income thereof, subject to the foregoing trusts, in trust for the wife, her executors, administrators, and assigns, "if she shall survive her now intended coverture, but if she shall die during her now intended coverture then in trust for the said T. E. Smith" (the father), "his executors, administrators, and assigns."

The marriage between the husband and wife was dissolved by decree of the Divorce Court, the wife being the guilty party, and the divorce decree was made absolute on August 6, 1886.

By an order of the Divorce Court dated December 9, 1886, varying the terms of the marriage settlement, it was provided that the Smith trust funds, including the above-mentioned sum of 10,000*l.*, should be held upon such trusts as would be applicable in respect of the same if the husband were dead and had died in the lifetime of the wife.

There was no issue of the marriage.

T. E. Smith, the father, died on December 5, 1903, and, the parties to the marriage being still alive, the trustees of the settlement took out this summons asking the Court to determine whether the sum of 10,000*l.* which the father by the settlement covenanted should be paid to the trustees by his executors was, when paid, to be held by them upon trust for the wife absolutely or upon trust for her for life with remainder, in the event of her death in the lifetime of the husband, to the executors of the father.

E. Knowles Corrie, for the trustees in support of the summons, stated the case to the Court.

Borthwick, for the executors of the father. It cannot be supposed that the determination of the coverture in the way in which it has determined was within the contemplation of the parties to the settlement. It was clearly intended that the coverture should last during the joint lives of the husband and wife, and the words "survive her now intended coverture" must be read as equivalent to "survive the husband." Upon the true construction of the instrument the wife is to take an

absolute interest only if she survives the husband, and if she does not do so the 10,000*l.* will go back to the father's estate. Effect ought now to be given to this right of the father's estate, which cannot be in any way affected or impaired by reason of the divorce proceedings. This is in accordance with *Fitzgerald* v. *Chapman* (1), where Jessel M.R. held that the rights of the guilty husband were not forfeited by the dissolution of the marriage, and, referring to the decisions in *Jessop* v. *Blake* (2), *Swift* v. *Wenman* (3), and *Fussell* v. *Dowding* (4), said that he could not follow cases "which were decided upon the ground that the dissolution of the marriage was equivalent to the death of the husband." See also *Burton* v. *Sturgeon.* (5) Nor can the order of the Divorce Court extend the effect of the covenant. The jurisdiction of the Court under the Matrimonial Causes Acts is for the variation of settlements as respects the settled property, not for the extension of them to property not settled. It is not contended that the wife can be deprived of all benefit under the settlement by reason of the divorce, but only that she cannot derive an increased benefit thereby. The settlement stands except so far as the order of the Court has altered the beneficial interests of the husband and wife, and the right of the father's estate remains unaffected. The Court will not allow the wife to take advantage of her own wrong so as to effect an acceleration of the absolute interest: *Cartwright* v. *Cartwright.* (6)

Method, for the wife. The question is simply one of the construction of this settlement. The words are perfectly clear. This lady is to be absolutely entitled "if she survives her now intended coverture." By reason of the divorce the coverture has come to an end. She has, therefore, survived the coverture, and it follows that she is absolutely entitled. *Cartwright* v. *Cartwright* (6) was a case not of a limitation but of a proviso. That case, together with the whole question of the effect of the policy of the law on the validity of trusts of this kind was considered in *In re Hope Johnstone.* (7)

(1) (1875) 1 Ch. D. 563, 570.
(2) (1862) 3 Giff. 639.
(3) (1870) L. R. 10 Eq. 15.
(4) (1872) L. R. 14 Eq. 421.
(5) (1876) 2 Ch. D. 318.
(6) (1853) 3 D. M. & G. 982; 10 Hare, 630.
(7) [1904] 1 Ch. 470.

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KEKEWICH J. This is one of those numerous cases in which an event has happened which was not in the contemplation of the parties to the document that has to be construed, in the sense that they really thought about it. It does not follow that although the event was not in their contemplation, yet if they have expressed themselves in adequate language, the Court may not give effect to the language notwithstanding that it may see very well that the matter was not considered. On the marriage of Donald Crawford and Virginia Mary Smith in 1881, T. E. Smith, the father of the lady, covenanted that his executors or administrators would within twelve calendar months after his death pay to the trustees of the settlement the sum of 10,000*l.* if his daughter should be then living. He died on December 5, 1903, and his daughter V. M. Smith is living. The result is that according to the terms of the covenant the estate of T. E. Smith is bound to pay to the trustees of the settlement 10,000*l.*, and from the exigency of that covenant it is impossible to escape. But then comes the question, the money being paid to the trustees, on what trusts are they to hold it? The settlement is in common form, the husband and wife take life interests, it matters not in what order, and in default of issue the fund is to be held on trust for the said V. M. Smith, her executors, administrators, and assigns, "if she shall survive her now intended coverture"; but "if she shall die during her now intended coverture," then on trust for T. E. Smith. One observes at once that the draftsman has framed the ultimate gift of the 10,000*l.* entirely in negligence of the words of the covenant. Under the covenant the 10,000*l.* is to be paid if V. M. Smith is living at the death of T. E. Smith; but under the ultimate gift T. E. Smith is not to get the 10,000*l.* back unless the lady, there being no issue, dies during her "now intended coverture." The two events are by no means the same. The marriage has been dissolved; there has been a divorce a vinculo matrimonii. Coverture may come to an end in three ways—by the death of the husband, by the death of the wife, or by a decree absolute in the Divorce Division. This coverture has come to an end in the last of those three ways. It has not the less come to an

end because it has done so in that way, and not in one of the natural ways. The coverture has ceased. How can I construe the trust as meaning anything else than what it says? There is no issue of the marriage, and, the interest of the husband being out of the way, the trust for the lady takes effect. The words are, "if she shall survive her now intended coverture." The coverture has come to an end. She is still living. Therefore she has survived the intended coverture. T. E. Smith's estate was only to get it back if she should die during her intended coverture.

Then with reference to the order of the Divorce Court directing that this fund is to be held upon such trusts as would be applicable if the husband were dead and had died in the lifetime of the wife, of course the Divorce Court has jurisdiction to vary settlements as is provided by s. 45 of the Matrimonial Causes Act, 1857, s. 5 of the Matrimonial Causes Act, 1859, and s. 3 of the Matrimonial Causes Act, 1878; and, that Court having made this order in the exercise of that jurisdiction, I must read the settlement as having been varied by saying that the husband is dead, and that the coverture has therefore ceased in that way. I opine that the Court has no power to interfere with the interests, rights, or liabilities of persons who are not parties, so that it could not in this case have made the father's covenant to pay other than what it actually was; but nothing turns on that, because the Divorce Court did not touch the father's covenant; it only ordered the money to be paid under the trust as if the husband were dead. Therefore, as the lady was living at the death of the father, his executors are bound to pay the money to the trustees of the settlement, and the trustees must pay it to the lady as having survived her coverture.

Solicitors: *Russell-Cooke & Co.; Pennington & Son, for Clayton & Gibson, Newcastle-upon-Tyne.*

C. C. M. D.

KEKEWICH J.

1904

Nov. 4, 10.

In re HANCOCK. HANCOCK *v.* PAWSON.

[1901 H. 3587.]

Election—Compensation—Election to take Property as against Will—Amount of Compensation, at what Date to be ascertained.

Where a beneficiary under a will, being put to his election, elects to take against the will, the amount of the compensation payable to the legatees who are disappointed by the election is to be ascertained at the date of the death of the testator, and not at the time when the election is made.

ADJOURNED SUMMONS.

Under an indenture of settlement dated August 8, 1887, the testator, Mortimer Hancock, was tenant for life of the Roxley Court estate in Hertfordshire, with power of appointment among any one or more of his issue, with remainder in default of appointment to his eldest son, the defendant Mortimer Pawson Hancock, in fee simple.

Mortimer Hancock, who died on July 13, 1901, by his will dated July 7, 1901, devised and bequeathed his residuary real and personal estate to trustees upon trust, after providing an annuity for his wife, for his three children in equal shares, and he requested his trustees to allocate to Mortimer Pawson Hancock as part of his share the Roxley Court estate.

In the administration of the estate the question arose how far the devise contained in the will operated as an exercise of the power of appointment conferred by the settlement; and by an order of Kekewich J. dated February 26, 1902, it was declared that the power of appointment conferred by the settlement of August 8, 1887, was not exercised by the will of the testator, and that the defendant Mortimer Pawson Hancock, who, in default of appointment, succeeded to the Roxley Court estate, was put to his election between the devise in his favour under the will and the Roxley Court estate.

On July 8, 1903, Mortimer P. Hancock gave notice to the trustees of the will that he elected to take under the settlement

and against the will. The delay in intimating his election arose from his absence in Egypt with his regiment.

In consequence of this election by Mortimer P. Hancock, compensation had to be made to the other beneficiaries to the extent of the benefit taken by him under the will, and the present summons was taken out for the determination by the Court of the question whether the amount of compensation was to be ascertained as at the death of the testator or as on July 8, 1903, the date of the election.

A. R. Kirby, for the trustees, in support of the summons.

Timins, for beneficiaries under the will. The Roxley Court estate is believed to have increased in value since the death of the testator, and therefore it is to the interest of the beneficiaries to say that the amount of compensation is to be ascertained as on the date of election. It is remarkable that there are no authorities directly in point, but it is submitted that the principle on which the doctrine of election proceeds —see *Streatfield* v. *Streatfield* (1)—is in favour of this view. Compensation is to be made to the disappointed legatees for that of which they are deprived by reason of the election, and they are not deprived of anything until the election has been made. In many cases, especially where an infant is interested, election may have to be deferred for a considerable period, and it would be inconvenient if the value of property in such a case had to be determined as at a date long past. The form of judgment in Seton, 6th ed. vol. ii. p. 1590, No. 7, in *Howells* v. *Jenkins* (2), appears to proceed on this basis.

C. A. Bennett, for an infant in the same interest.

Cozens-Hardy, for the defendant Mortimer P. Hancock. The election, as was said in *Gretton* v. *Haward* (3), is "retrospective, reverting to the time of the will"; and it follows that the amount of the compensation payable as the result of the election ought to be ascertained as at the death of the testator. In the case of *In re Lord Chesham* (4), where at the death of

(1) (1735) Cas. t. Tal. 176; 1 Swans. 447.
(2) (1863) 1 D. J. & S. 617.
(3) (1819) 1 Swans. 409, 435; 18 R. R. 95.
(4) (1886) 31 Ch. D. 466.

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the testator no election was practicable as to settled heirlooms, and the heirlooms were subsequently sold under the Settled Land Act, it was held that the sale made no difference, since the equities of the parties had to be determined according to the circumstances existing at the testator's death. In the forms of judgment in Seton where a period of time is stated, it is not the date of election, but the date of the death of the testator: see p. 1579, No. 6, *Douglas* v. *Douglas* (1), and p. 1591, No. 8, *Rogers* v. *Jones*. (2) The text-books appear to refrain from any reference to this subject, with the exception of Ashburner's Principles of Equity, where at p. 673 it is stated that "the rights of the parties are fixed when the duty to elect arises"—that is, at the testator's death. It does not seem to be in accordance with principle that the amount of the compensation should depend on the mere accident whether the election takes place sooner or later.

Timins, in reply.

Cur. adv. vult.

Nov. 10. KEKEWICH J., after referring to the terms of the will, continued as follows:—By an order of February 26, 1902, the defendant Mortimer Pawson Hancock was held bound to elect between the devise and bequest in his favour under the will and his interest in the Roxley Court estate. On July 8, 1903, he gave the trustees of the will notice of his intention to take the estate under the provisions of a settlement which was his title to it, and against the will. Thereupon he became liable to make compensation to the disappointed legatees to the extent of the benefits which he takes under the will, and it has to be ascertained what they have lost. A question has been raised, and is submitted by the summons, whether the amount of compensation is to be ascertained at the date of the death of the testator, or as on July 8, 1903, when election was made.

Cases of election and consequent compensation are of such common occurrence that one is startled to find this question treated as unsettled at the present day. Really, there is no

(1) (1871) L. R. 12 Eq. 617. (2) (1876) 3 Ch. D. 688.

doubt about it. The principle on which the rule of the Court is founded has been stated again and again in plain language, but nowhere more clearly than by Lord Talbot L.C. in *Streatfield* v. *Streatfield* (1): "When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take entirely, but not partially under it; as was done in *Noys and Mordaunt's Case* (2); there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made." The decree in *Streatfield* v. *Streatfield* (3) is set out in a note, p. 447, of 1 Swanston's Reports, and study of that decree will shew that it was intended to work out the principle thus stated by the Lord Chancellor. It is also stated in equally clear language by Sir Thomas Plumer M.R. in *Gretton* v. *Haward* (4) thus: "The only remaining question is, on what terms must compensation be made? From what time is the estate at Nine Elms to be given up to the petitioner? The election is retrospective; reverting to the time of the will, the parties electing reject all that comes under it; consequently they have in the interval enjoyed the property of another; to retain the past rents and profits which they have received with no other title than that conferred by the will, would be to claim under it; renouncing the will, they admit that they have been in possession of an estate without title. There must be a retrospective account of rents and profits, and an account of sums expended for melioration of the estate, which must be reimbursed." The injustice of proceeding on any other basis than this becomes obvious when one reflects that it often happens (as has happened here) that after the liability to elect has been declared a period is allowed for consideration and determination on the part of the person affected by such liability, so that the actual election is frequently not made until some time after the testator's death, and that according to well-settled rule an infant bound to elect is

(1) Cas. t. Tal. 182 of the 3rd edition, published in 1792; 1 W. & T. 7th ed. p. 419.

(2) (1706) 2 Vern. 581.

(3) Cas. t. Tal. 176.

(4) 1 Swans. 409, 434; 18 R. R. 95.

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generally, though not invariably, allowed to declare election within six months after attaining majority.

The forms—see 2 Seton, p. 1579, No. 6, and p. 1591, No. 8—proceed on these lines, and if it be possible, as it may be, to find orders framed differently, this may fairly be accounted for by supposing that there were peculiar circumstances to take the case out of the general rule. The difficulty of valuing property, especially real estate, as of a date long since passed, is always considerable, and the parties concerned might agree, and the Court itself might be of opinion that it would be more convenient, to accept a valuation at a later date. The question submitted by the summons must, therefore, be answered by declaring that the amount of compensation must be ascertained as at the date of the testator's death.

Solicitors: *Nicholson, Patterson & Freeland; Dimond & Son.*

C. C. M. D.

KEKEWICH J.

1904

Nov. 26; *Dec.* 2.

EDWARDS *v.* HOOD-BARRS.

[1902 E. 87.]

Release—Trustee—Breach of Trust—Joint and Several Liability—Compromise with one Trustee—Release pro tanto of the others—Right to prove in the Bankruptcy of another Trustee for full amount of Debt.

Where in an action against trustees for breach of trust a sum is certified to be due from the defendants to the plaintiff, the acceptance by the plaintiff of a payment by one trustee by way of compromise in discharge of his liability does not operate as a release pro tanto of the others; consequently the plaintiff may prove in the bankruptcy of another trustee for the full amount of the certified debt without giving credit for the compromise.

THIS action was brought to enforce liability against trustees for breaches of trust; and by an order of July 18, 1902, the executors of Henry Hollier Hood-Barrs, one of the trustees, admitted that his estate was liable, and two other trustees, John William Barrs and Hugh Montgomery Drake, admitted that they were jointly and severally liable to make good to the

trust estate two sums of 4830*l.* and 4500*l.* By the same order an account was directed as to what was due from the estate of Henry Hollier Hood-Barrs and from the other two trustees on the footing of the foregoing admissions. The inquiry was answered by the master's certificate, dated August 4, 1904, which found a balance of 10,004*l.* 7*s.* due from the estate of the deceased trustee and from the other two trustees. In the meantime, by an order dated November 11, 1902, the Court sanctioned a compromise with the defendant John William Barrs, from whom was accepted 1900*l.* in full settlement and discharge of his liability to the plaintiffs in the action.

The plaintiffs now took out a summons, which was in effect the further consideration of the action, for an order in the terms of the minutes annexed thereto, and upon this summons the question was raised whether the plaintiffs were entitled to prove against the estate of Henry Hollier Hood-Barrs, who died insolvent, for the full amount of the sum certified to be due from the trustees, or only for the balance after deducting the 1900*l.* paid by John William Barrs in discharge of his liability. Hugh Montgomery Drake was not represented upon the hearing of this summons.

P. O. Lawrence, K.C., and *E. Ford*, for the plaintiffs. The liability of the trustees is joint and several, and it is submitted that the plaintiffs are entitled to prove against the estate of Henry Hollier Hood-Barrs for the full amount of the certified sum without giving credit for the sum paid on the compromise: *Bagnall* v. *Carlton.* (1)

Stewart-Smith, K.C., and *Ribton*, for the executors of Henry Hollier Hood-Barrs. No doubt this is a joint and several liability, but a release of one trustee would release all, and a pro tanto release of one would be a pro tanto release of the others: *Commercial Bank of Australia* v. *Official Assignee of the Estate of Wilson & Co.* (2) It is not contended that the compromise operates as a release of the whole debt, because the circumstances of the case exclude that notion; but it is impossible to pay off a part of a joint debt without also paying

(1) (1877) 6 Ch. D. 371. (2) [1893] A. C. 181.

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off a corresponding part of the separate debt, and we therefore say that the plaintiffs' proof must be limited to the balance of the debt after giving credit for the compromise.

[They also referred to *Dyke* v. *Mercer*. (1)]

P. O. Lawrence, K.C., in reply. In accepting the payment from John William Barrs there was no intention to release the liability of the other trustees either wholly or in part.

Cur. adv. vult.

Dec. 2. KEKEWICH J. (after stating the facts). On the hearing of the summons now before me, which is really the further consideration of the action, the plaintiffs claimed to prove against Henry Hollier Hood-Barrs' estate, admittedly insolvent, for the full amount certified, and it is contended by the executors on behalf of that estate that the proof ought not to be allowed for the full amount, but that a deduction ought to be made of the sum paid by John William Barrs in reduction of the sum certified, and that the proof should only stand for the balance.

Two cases were cited. In *Bagnall* v. *Carlton* (2) it was endeavoured on behalf of defendants held liable to the plaintiffs to deduct from the amount claimed a sum of 31,000*l.* satisfied by other defendants, and the Court of Appeal held that the sum of 31,000*l.* was paid in respect of a claim entirely different from that sought to be enforced, and that, therefore, no deduction was possible. The decision of the Court proceeding on that ground has really no bearing on the present case. In *Commercial Bank of Australia* v. *Official Assignee of the Estate of Wilson & Co.* (3), the only question was whether certain sums provided by two sureties had been paid or not. It was admitted that if they had been in fact paid, these sums must be deducted from the amount recoverable from another of the co-sureties ; but it was held that no payment had been made, and that, therefore, there could be no deduction. This case, therefore, has no bearing on the present. I have searched

(1) (1684) 2 Show. 394. (2) 6 Ch. D. 371.
(3) [1893] A. C. 181.

in vain for any other authority to which reference could usefully be made, and the point must be disposed of on principle. Here is no contract of suretyship or question between co-sureties. We are concerned only with the liability of trustees which is joint and several, and it seems to me that until the plaintiffs have received 20*s.* in the pound they are entitled to claim the whole debt from any one trustee notwithstanding that another trustee has made a payment in respect of his several liability and whether in or towards satisfaction of that liability. Therefore, the plaintiffs are, in my opinion, entitled to prove against the estate of Henry Hollier Hood-Barrs for the full amount found due by the certificate and to receive dividends on such proof until by means thereof and payments by the other trustee that amount has been wholly satisfied. The order must be framed on that footing.

Solicitors: *Beyfus & Beyfus; Rutter, Veitch & Bond.*

H. B. H.

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1904

Oct. 27, 28.

ATTORNEY-GENERAL *v.* METROPOLITAN ELECTRIC SUPPLY COMPANY, LIMITED.

[1904 A. 391.]

Company—Memorandum of Association—Electric Lighting—Special Act—Statutory Areas of Supply — Statutory Prohibition against supplying Electric Energy beyond Statutory Areas — Statutory Power to erect Generating Station outside Areas—Supplying Electric Energy outside Areas—Injunction—Metropolitan Electric Lighting Act, 1889 (52 *&* 53 *Vict. c. cxcvi.*), *ss.* 3, 4, 5, 12, 13—*Metropolitan Electric Supply Company Act*, 1898 (61 *&* 62 *Vict. c. ccxxxv.*), *ss.* 2, 16.

In 1889 a limited liability company, formed under the Companies Acts, 1862 to 1886, for the purpose of generating and supplying electric energy, obtained a special Act and certain provisional orders of the Board of Trade empowering them to erect generating stations and to supply electric energy in three defined areas within the administrative county of London. The special Act and the orders contained a clause prohibiting the company from supplying energy or erecting electric works beyond their statutory areas, except by the authority of Parliament or under a licence from the Board of Trade. In 1898 the company, being unable to supply the demands of their customers in their statutory areas from their generating stations in those areas, obtained another special Act authorizing them to erect generating works in an urban district, and from thence to supply energy to their statutory areas. The urban district was outside the statutory areas and outside the county of London. In 1903 the company, purporting to act under the general powers in their memorandum of association, commenced to supply energy from their works in the urban district to a railway company in that district. In an action by the Attorney-General, at the relation of the local authority of the urban district, to restrain the company from so doing:—

Held, that the company were contravening the prohibition in their special Act, and an injunction was granted accordingly.

THE defendant company were incorporated in the year 1887 under the Companies Acts, 1862 to 1886, and under their memorandum of association had full and unrestricted powers of acquiring land, erecting electric works, and producing and supplying electric energy.

Under certain special Acts of Parliament, and provisional orders granted by the Board of Trade under the Electric Lighting Acts, 1882 and 1888 (hereafter referred to as the principal Act), the company obtained powers to supply electrical

energy for all purposes to three districts within the administrative county of London. The Metropolitan Electric Lighting Act, 1889 (which was passed on August 26, 1889, and is the first of the special Acts), enacts as follows:—

Sect. 3: "The undertakers for the purposes of this Act are 'The Metropolitan Electric Supply Company, Limited.' . . .

"Provided that if the undertaking or any part thereof is at any time purchased by or transferred to any other body or persons in accordance with the provisions of this Act or of the principal Act, such body or persons shall from the date of such purchase or transfer be the undertakers in relation to such undertaking or part thereof for the purposes of this Act in lieu of the company above mentioned.

"The undertakers shall not purchase or acquire the undertaking of or associate themselves with any other company or person supplying energy under any license, provisional order, or special Act within the administrative county of London unless the undertakers are authorised by Parliament to do so."

Sect. 4: "Subject to the provisions of this Act the area of supply shall be the whole of the area included in the first schedule. . . ."

Sect. 5: "The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament, or under a license granted by the Board of Trade under the principal Act:

"Provided that where the undertakers were on the 20th of May, 1889, supplying or under any binding agreement to supply energy to any premises beyond the area of supply they may continue to supply or supply energy to such premises until the 29th of September, 1890. . . .

"All electric lines or works used by the undertakers under the provisions of this section for the purpose of supplying energy beyond the area of supply and situate in, over, or across any street or public place may, and shall, unless sold or transferred to some body or person authorised to supply energy in the place where such electric lines and works are situate, be

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removed by the undertakers within six months after the expiration of the period during which they are by this section authorised to supply energy by means of such electric lines or works. If the undertakers fail to remove any such electric lines or works (not so sold or transferred as aforesaid) within the said period of six months, they shall be liable to a penalty not exceeding 20*l.* for every such offence, and any Court of summary jurisdiction on complaint made may make an order authorising the removal of any such electric line or work by such person and on such terms as they may think fit."

The area of supply described in the 1st schedule to this Act comprised a certain district within the county of London.

Each of the subsequent special Acts and orders which empowered the company to supply electric energy in certain areas therein defined contained provisions similar to those in the Act of 1889 stated above; and each of the defined areas of supply was within the county of London.

The Metropolitan Electric Supply Company Act, 1898, after reciting the special Acts and provisional orders empowering the company to supply electric energy to their defined areas within the county of London, and reciting—

"Whereas the demand for the supply of electric current within the areas supplied and authorised to be supplied by the company has increased and is increasing very rapidly, and in order to enable the company to meet this demand the company have found it practically impossible to provide adequate station accommodation within their said areas:

"And whereas the company in order to provide for the demands upon them have acquired a piece of land in the parishes of Willesden and Acton and are engaged in constructing a large electrical generating station and works thereon on which they have expended, and are in course of expending, large sums of money:

"And whereas it will conduce to the convenience of those who use the electric current in the said several areas of supply of the company that the company should be empowered to supply from the said electrical generating station and works electric current to their distributing stations within the several

areas of supply hereinbefore mentioned, and for that purpose to lay down electric cables or wires from the said lands to connexions within their several distributing stations and mains and cables within their several authorised areas of supply:

"And whereas the objects of this Act cannot be attained without the authority of Parliament:"

enacted as follows:—

Sect. 2: "It shall be lawful for the company to hold and use as a station for generating electric current or electrical energy certain lands recently acquired by them in the parishes of Willesden and Acton and county of Middlesex or some part thereof" [here followed a description of the parcels], "and to establish and work on those lands plant for generating electrical energy and for other purposes incidental to or connected with their undertaking or business."

Sect 16 empowered the company to use any of their cables or wires and any mains or cables connected therewith for the transmission of electric current or electrical energy from their works on the said lands at Willesden and Acton to the several distributing stations of the company in their several authorized areas defined by the Act of 1889 and the provisional orders, and to use the generating station on the said lands for the purpose of supplying electric current or electrical energy within the several areas or districts over which the company had then powers of supply, or which they might thereafter have such powers under any special Act or provisional order.

The said lands at Willesden and Acton on which the company were erecting their generating station was outside the administrative county of London and within the urban district of Willesden; and the urban district council of Willesden, who were the local authority for that district, were themselves authorized under certain special Acts and orders to supply electric energy to any person, company, or corporation within the urban district.

In December, 1903, the company commenced to supply a railway company at Willesden with electrical energy from their generating station on the said lands at Willesden, and thereupon this action was commenced by the Attorney-General,

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at the relation of the urban district council of Willesden, who were co-plaintiffs, claiming a declaration that the company were not entitled to supply to any person, company, or corporation electrical energy for consumption or use within the urban district of Willesden otherwise than under the authority of Parliament or a licence from the Board of Trade under the Electric Lighting Acts, 1882 and 1888; and an injunction accordingly.

Upjohn, K.C., and *J. W. Greig*, for the plaintiffs. It is a question of the construction of the special Acts and orders regulating the undertakings which the defendants are carrying on. None of their statutory areas under their Acts and orders include the place which we object to their supplying, and under the Act of 1898 they are only entitled to use their generating station at Willesden for the purpose of supplying their statutory areas within the county of London. No doubt their memorandum of association is wide enough to enable them to do what is complained of, but our contention is that they are prohibited by s. 5 of the Act of 1889 from supplying elsewhere than to their statutory areas so long as they are holding those areas under their special Acts. The relators have an electric lighting undertaking in Willesden under a special Act and order, and it is a very serious thing if the defendants, who have a generating station at Willesden from which to supply their statutory areas in London, can now supply the Willesden district; and having regard to the number of Acts and orders containing this prohibition, it is a matter of great importance to many bodies who are not parties to this action. Reading the general Electric Lighting Acts, 1882 to 1899, with the defendants' special Acts, it is obvious that the word "undertaking" in those Acts means their statutory undertaking under their special Acts and orders, and does not extend to their undertaking at large under their memorandum of association. The preambles to the Acts of 1889 and 1898 support this view, and there is nothing in the Act of 1898 which releases the defendants from their statutory obligations or that enables them to supply

electric energy in the Willesden district in competition with the relators. The defendants are, therefore, committing a breach of the statutory prohibition, and the Attorney-General can sue to restrain it.

Cripps, K.C., *Jenkins, K.C.*, and *Sargant*, for the defendants. It is not disputed that the Attorney-General can maintain this action if the defendants have gone outside their statutory powers; but they have not done so. The general Lighting Acts of 1882 to 1899 do not really affect the question, which turns on the special Acts. First of all, the defendants by their memorandum and articles were free to set up a generating station at Willesden or any other place. Then they came to Parliament for special powers in these metropolitan areas, and the Legislature did not interfere with their general powers as a limited company, but as regards each metropolitan area of supply and limited to each metropolitan area of supply they were given special powers and put under special disabilities, and were not to use those powers for raiding any adjoining metropolitan area, where in most cases some other company had similar powers and had been granted a similar position. But even if the defendants were placed under a special disability by the Act of 1889, that disability was modified or impliedly removed by the Act of 1898, by which they were empowered to use their Willesden works in a general way and for all purposes without any limitation. The defendants did not want special powers to buy the land at Willesden and erect their works there. They did that under the general powers of their memorandum and articles. But they did want to connect those works with their several statutory areas, and so they got the Act of 1898, which by ss. 2 and 16 empowers them to erect plant at Willesden, and from thence to supply their statutory areas. We rely on s. 2, and in particular on the words "and for other purposes incidental to or connected with their undertaking or business." The word "undertaking" there is not confined to their statutory undertaking, but means their undertaking or business at large under their memorandum and articles. The object of the Act of 1898 was to enable them to supply their statutory areas from Willesden. The preamble shews this. Apart from

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the Act, they could under their general powers have erected plant and supplied energy in Willesden. Next, some limitation must be placed on the general language in ss. 3 and 5 of the Act of 1889. That Act did not take from the company any powers they already had, but conferred on them special powers in certain limited areas within the administrative county of London, and all the prohibitions in the Act relate to what they may not do within that county. The word "undertakers" in s. 3 does not mean the company for all purposes and for all time, but merely the company so long as they are running their statutory undertaking under the Act; and it is submitted that the general prohibition in s. 5 should be read as limited to the administrative county of London, and that the restriction intended is that the company, quâ undertakers, shall not use any of the powers of the Act for the purpose of supplying energy outside their statutory area of supply otherwise than under the authority of Parliament or under a licence from the Board of Trade. If our statutory areas were all gone, we could still carry on our Willesden works and supply energy in the Willesden district.

Upjohn, K.C., in reply.

FARWELL J. This is an action by the Attorney-General in which he complains that the defendant company are contravening the negative prohibition in the Act of 1889, and the three orders confirmed by Act of Parliament under which their undertakings are held, and seeks for an injunction to restrain them. The company have three statutory areas, all within the administrative county of London. Of course, the Attorney-General can maintain such an action irrespective of the fact that the Willesden Urban District Council, who join as relators for the purpose of costs, would have no right of action by themselves.

Now the question really turns on the construction of the two Acts of 1889 and 1898. The wording of the negative clauses in the Act of 1889 and in the three orders is practically identical, and I propose only to refer to the Act of Parliament. The company found that they were unable conveniently

to generate sufficient electricity in their three statutory areas for the supply of their customers within those areas. They accordingly obtained statutory authority to set up a generating station at Willesden, which is without those three areas and also without the administrative county of London, and they also acquired statutory authority to supply their areas from that generating station. The company are not formed under any private Act of Parliament, but are a limited company under the Companies Acts of 1862 to 1886, and it is not suggested that they have done anything ultra vires the powers of their memorandum of association; but for the purpose of the argument in this case they are in very much the same position as an individual would be if he chose to do this as a private speculation. Turning to the Acts of Parliament, I find that the first Act was passed on August 26, 1889. It defines "The Undertakers" as "The Metropolitan Electric Supply Company, Limited, being a company registered under the Companies Acts, 1862 to 1886, with limited liability and a capital of 500,000*l.*" Before I go through the two or three other sections to which it is necessary to refer, I should say, having regard to the arguments I have heard, that I think it is germane to the subject to consider what the Legislature had in view in making the provisions which I find in the Act. As it was put in *Heydon's Case* (1), which Lord Halsbury cited in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents* (2), "we are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy." That is a general way of stating it: but no doubt one is entitled to put one's self in the position of the Legislature at the time the Act was passed in order to see what was the state of knowledge, what were the circumstances brought before the Legislature, and what it was the Legislature was aiming at. I have been told by counsel on both sides that the object of Parliament was, first of all, to allot certain districts which should be dealt with by certain companies, and, as

(1) (1584) 3 Rep. 7 a. (2) [1898] A. C. 571, 573.

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appears from Major Marindin's report to the Board of Trade, which both parties have agreed to refer to, the idea was that in the London districts at any rate there might be two companies in each district or area, because there are two alternative systems of supply, and one might use one system and the other the alternative system; but there should not be more than two companies in any one area. Competition was no doubt intended to be limited, so that each company should have its own area, or so that the two companies should have their own area to themselves. But further than that, I think the Legislature also took into consideration the financial condition of the company to which it was giving statutory authority. I think it is only right to infer that they would do so, for it is obvious with regard to a company asking for statutory powers to break up streets, to interfere with the traffic of the highway, and to carry on the various works which necessarily interfere a good deal with the general user by the public of what is public property, that the Legislature would naturally take pains to see that the company which they do so authorize to interfere has money enough, not only to carry out its work, but also to continue to carry on the undertaking when it has once been established. For those purposes amongst others the Act of Parliament has inserted in it various clauses with reference to the solvency of the company and its accounts. Bearing in mind that those are two of the objects which Parliament had in view, I find this proviso at the end of s. 3 of the Act: "The undertakers shall not purchase or acquire the undertaking of or associate themselves with any other company or person supplying energy under any license, provisional order, or special Act within the administrative county of London unless the undertakers are authorised by Parliament to do so." Having regard to what I have just said as to the practice of allowing two companies to compete within each area in the administrative county of London and not outside, I think it is exceedingly probable that the proviso was put in with that object, and that probably it never was contemplated that this company or any company would be the least likely to want to go outside the administra-

tive county. However that may be, I can only deal with the words as I find them, and they, no doubt, apply only to companies and persons within the administrative county. Then comes the 5th section, which is the material section in the present case, and it is in terms both general and explicit: "The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament, or under a license granted by the Board of Trade." The undertakers are in this case supplying energy to a railway company at Willesden which is outside their area, and they are driven to contend that some limitation must be placed on the clear negative words of s. 5. First of all, they say that "the undertakers" cannot mean simply the defendant company for all time. To that extent, although it is not necessary for me to determine it now, I am disposed to agree with them. I do not suppose it was intended to say that the defendant company shall never do this whatever happens, but the qualification, if any is necessary, is "the undertakers so long as they remain undertakers in the sense that they are working this undertaking." That qualification I am willing to accept, but it does not help them. The limitation they ask me to place on s. 5 is this: "shall not use any of the powers given to them by this Act for the purpose of supplying energy outside otherwise than," &c. I see no ground whatever for so limiting the generality of the words, nor do I feel justified in inserting any words at all. Even if there were any possibility of limiting them so as to make it not inconsistent with s. 3—as to which I express no opinion—it would not help the defendants in the present case, because the circumstances have not arisen; they have not acquired or purchased the undertaking of any other company or person within the county of London. They are simply themselves using their new generating station for the purpose of supplying customers outside their statutory area. Neither Mr. Cripps nor Mr. Jenkins had the courage to ask me to insert the words "within the administrative county of London" after the words

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of limitation they suggested, nor do I see how it would be possible. There is a further point, that the clause immediately following these negative words excludes any idea of any limitations on the use of any of the powers within the area of supply. It runs: "where the undertakers were on the 20th May, 1889"—which is three months before the Act was passed—"supplying or under any binding agreement to supply energy to any premises beyond the area of supply," they may continue to do so for a limited period. That clause is absolutely unnecessary if the prohibition in s. 5 is confined to the statutory areas. It is quite plain that the undertakers before the passing of the Act were not using any powers of the Act, for there were none to use; and if they were supplying energy beyond the limits of supply, they were doing it by virtue of some rights or powers of their own as a limited company, and not as undertakers under the Act. The general prohibition in s. 5 is absolutely inconsistent with any such limitation as I am asked to insert, and I find myself wholly unable to insert it. Then that being the negative clause, one finds, as one would expect, a corresponding affirmative clause—s. 9: "Subject to the provisions of this Act, the undertakers may supply energy within the area of supply," and so on. I do not think there is any other section in this Act to which it is necessary to refer, and I turn now to the Act of 1898. It is to be remembered that the argument which I have heard deals with each area as intended to be a self-sufficing area, in which there should be a statutory company generating its own electricity and supplying it to its customers within its own area, all being done within its own area, so that each area should be a distinct kingdom to itself. The preamble of the Act of 1898 contains this recital: "And whereas the demand for the supply of electric current within the areas supplied and authorised to be supplied by the company has increased and is increasing very rapidly, and in order to enable the company to meet this demand the company have found it practically impossible to provide adequate station accommodation within their said areas." See now what Parliament is told. The Legislature has thought it proper to have a number of small

electric domains complete within themselves, and Parliament is told that that particular system in the present case will not work because the supply and demand have increased so rapidly that their generating stations are insufficient to supply the needs, and for obvious reasons. In densely populated districts you cannot put up a very large generating station or multiply generating stations without the risk of continual injunctions against nuisance. They accordingly appealed to Parliament to relax its policy in this particular—because they cannot undertake to supply their own customers within their statutory areas from generating stations within those areas—and to allow them to put their generating station to supply those areas outside. That is the whole purview of the statute. To my mind it is as plain as possible. The preamble continues: "Whereas the company in order to provide for the demands upon them"—that is, the demands referred to in the previous recital from their own customers within their own areas—"have acquired a piece of land in the parishes of Willesden and Acton, and are engaged in constructing a large electrical generating station and works thereon on which they have expended and are in course of expending large sums of money. And whereas it will conduce to the convenience of those who use the electric current in the said several areas of supply of the company that the company should be empowered to supply from the said electrical generating station and works electric current to their distributing stations within the several areas of supply hereinbefore mentioned, and for that purpose to lay down," &c. The whole scope of the preamble is limited to the convenience and the benefit of the customers within the statutory areas, and the purport of the Act is to enable the company to substitute a generating station outside for the generating station within the areas. Sect. 2 is in general terms. I express no opinion about what may happen if the company should eventually deprive itself of or give up its three statutory areas. What this section will mean then somebody else may construe when the event happens. I pass it by with the observation that it is simply an authority to hold and to use as a station for generating purposes a certain piece of land,

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"and to establish and work on that land plant for generating electrical energy and for other purposes incidental to their undertaking or business." Those words do not in terms or by implication authorize the supply of anything from that station. They simply authorize the manufacture and the generation of power on that spot. It is the 16th section which enables them to supply. It is plain to my mind, and it is consistent with the preamble, that the supply is only to the several areas or districts over which they now have or may hereafter have such powers under any special Act or provisional order. The argument for the defendants is that the words "and elsewhere wherever they may think fit to use it as a limited company," or words to that effect, should be implied. But it appears to me to be absolutely impossible that I should read anything into this Act which impliedly authorizes their doing anything in contravention of the express prohibition in s. 5 of the Act of 1889. But it does not stop there, for in ss. 12 and 13 of the Act of 1898 there is an express saving: "Nothing in this Act contained is to be deemed to release the company from any of the duties, liabilities, or conditions"—Mr. Cripps admits that the prohibition in s. 5 of the Act of 1889 is a condition—"imposed upon them" by certain orders. One is the Paddington Lighting Order of 1890, which contains a prohibition exactly to the same effect; and the other is the West London Lighting Order of 1880, which also contains a prohibition to the same effect. On all these grounds it appears to me that the company are acting in direct contravention of their special Acts of Parliament. I therefore propose to make the declaration and to grant an injunction as asked.

Solicitor for plaintiffs: *W. G. Greig.*
Solicitors for defendants: *Barlow & Barlow.*

H. L. F.

FINANCE AND ISSUE, LIMITED *v.* CANADIAN PRODUCE CORPORATION, LIMITED.

BUCKLEY J.

1904

Aug. 5, 12.

[1904 F. 1229.]

Company—Prospectus—Irregular Allotment—Return of Application Money—Cancellation of Allotment—Rescission—Ultra Vires—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 4, 5, 12.

The defendant company was registered in 1897, but no public issue of its shares was then made. On May 12, 1904, an agreement was entered into between the plaintiffs and the defendants that the plaintiffs should bear the expense of issuing and advertising a prospectus, which had been prepared by the defendants, in return for certain payments. The prospectus was duly issued. It stated that the minimum number of shares upon which allotment would be made was 40,000. As soon as the subscriptions amounted to 40,003 the directors proceeded to allot shares to the applicants, including the plaintiffs, and received the application money. It turned out that some of the applications were not effective, and that the minimum subscription had not been reached. The directors of the defendant company proposed to give to each allottee the option to have the allotment cancelled and the application money returned. The plaintiffs moved for an injunction to restrain them from doing so:—

Held, that the agreement gave the plaintiffs no right to the injunction; that the allotment was irregular under s. 4 of the Companies Act, 1900, and was voidable; that under that section the allottees had a right at any time to rescind their contract to take shares; that the allottees could also rescind on the double ground that there was an untrue statement in the prospectus, and that the condition with respect to the minimum number of shares had been broken; and that the proposed action of the directors was not ultra vires.

THE defendant company was registered on September 23, 1897, but no public issue of its shares was made till May 14, 1904. On May 12, 1904, an agreement was made between the defendants and the plaintiffs that the plaintiffs should bear the expense of issuing and advertising a prospectus which had been prepared by the defendants inviting subscriptions for 186,000 shares in the defendant company. Subject to the defendants going to allotment and paying to the plaintiffs the consideration thereinafter provided, the plaintiffs were to make certain payments, and the defendants were to pay to the plaintiffs

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21,000*l.*, as to 7000*l.* in cash, and the balance of 14,000*l.* by allotment to the plaintiffs of 14,000 fully paid shares of 1*l.* each in the defendant company. The 7000*l.* was to be paid, as to 4000*l.* within one calendar month from the date of the first general allotment of shares in the defendant company, and the balance of 3000*l.* by two instalments of 1500*l.* each within two and four months respectively after the allotment. The 14,000 shares were to be allotted within one month from the first general allotment.

The plaintiffs spent 1950*l.* in issuing and advertising the prospectus; but the defendants had only paid 1200*l.* to them out of the 7000*l.*, and they had not allotted to them any of the 14,000 shares. The first general allotment of shares in the defendant company took place on May 20, 1904. The prospectus stated that "the minimum number of shares upon which allotment will be made is 40,000." Before the issue of the prospectus the defendants had received subscriptions for 20,726 shares in England, and the application money of 1*s.* per share had been paid to the company. The directors heard that 3000 shares had been applied for in Canada, and stated in the prospectus that 23,726 shares had been applied for. In reply to the prospectus further applications were received, and the directors went to allotment upon a total subscription of 40,003 shares. They allotted shares to the plaintiffs amongst others. It turned out that application money had only been paid on 2425 shares applied for in Canada, and that some of the applications had been for preference shares, of which there were none.

On July 14, 1904, the directors of the defendant company sent out a circular to the shareholders as follows:—

"To the Shareholders.

"Dear Sir (or Madam),

"I am desired by the directors of the Canadian Produce Corporation, Limited, to write to you with reference to the allotment of shares in the company which took place on the 20th May last.

"It will be remembered that the number of shares fixed by the prospectus as the minimum for allotment was 40,000, and the prospectus stated that 23,726 shares had been applied for

in advance by the directors and their friends. In reckoning the number of shares applied for in advance the directors included 3000 shares which had been applied for in Canada.

"The directors have recently ascertained that, although 3000 shares had been so applied for, the moneys payable on application in respect of 575 of those shares had not been paid at the time of the allotment. The consequence is that the directors, in proceeding to allotment, inadvertently acted contrary to the provisions of s. 4 of the Companies Act, 1900, although they acted in good faith.

"The directors have, since they ascertained the fact, carefully considered and been advised upon the matter.

"The fact that such a small amount of application moneys had not been paid may seem a small matter, but having regard to the provisions of s. 4 of the Companies Act, 1900, it is sufficient to invalidate the allotment, and, acting upon the advice of counsel, the directors have decided to give to each allottee of shares the option of having the money paid by him or her repaid and the allotments cancelled.

"Will you kindly sign the accompanying form stating your desire in the matter, and send the same to me as soon as possible, and not later than the 25th inst.

"I am,

"Yours truly,

"Jas. Stewart,

"Secretary."

On July 21, 1904, the plaintiffs issued a writ against the defendants for (1.) specific performance of the contract of May 12, 1904, and damages for the breach thereof; (2.) payment of the sum of 7000*l.* payable under the contract; (3.) an injunction to restrain the defendants from returning to any of the persons to whom any shares in the defendant company had been allotted any of the moneys paid to them on application for or allotment of shares in the defendant company.

The plaintiffs now moved for an interim injunction to restrain the defendants from "returning to any of the persons to whom shares in the defendant company have been allotted any of

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the moneys paid by the said persons on application for or allotment of the said shares, and from cancelling or purporting to cancel any of the said shares."

Buckmaster, K.C., and *Houston*, for the plaintiffs. If the defendants are allowed to cancel this allotment they will defeat our only chance of getting payment. They have no power to undo the allotment which they have made, and have no right to break their agreement with us by getting rid of all their assets. They are really attempting in this way to reduce their capital. It is suggested that s. 4, sub-ss. 1 and 4, of the Companies Act, 1900, govern this case; but they do not, for an allotment has actually been made. Sect. 5, which contains provisions with respect to the effect of irregular allotment, does not apply, for it depends upon the holding of a statutory meeting which, by s. 12, sub-s. 1, this company, incorporated in 1897, cannot hold. The allotment was a wrongful act on the part of the directors, but there is no imputation on their honesty. There may be remedies against them personally; but a company has no power to cancel an allotment unless incorporation was after 1900, and s. 5 applies.

Sect. 4 gives no right of rescission. This is like cases under s. 38 of the Companies Act, 1867, which, it has been held, gives shareholders no right of rescission; their remedy is against the director who has omitted to state the contract: *Gover's Case.* (1) The proposed return of money is ultra vires. There has been an allotment in fact, and it is not possible for the company or the directors to cancel it.

[BUCKLEY J. The allottees have applied on the footing that there should not be an allotment unless 40,000 shares were subscribed for. That representation lies at the root of their contract.]

Then each allottee must prove that he applied on the faith of that statement.

Astbury, K.C., and *George Henderson*, for the defendant company. We had no alternative but to act as we have done. Sect. 4 of the Act of 1900 applies to us, and we have broken

(1) (1875) 1 Ch. D. 182.

its provisions by proceeding to allotment before the minimum subscription had been reached. That allotment is altogether void, and we must return the money.

[BUCKLEY J. Sect. 5 does not apply to you; but it shews that s. 4 makes an irregular allotment voidable only, not void.]

On that assumption our contract with the allottees is on a basis which gives them a right to rescind.

[BUCKLEY J. But an applicant's right to rescind so far as the statute is concerned is by s. 5 limited, and ceases at the expiration of one month from the statutory meeting.]

Yes; but not in this case, for s. 5 does not in terms apply. Sect. 38 of the Act of 1867 does not prohibit allotment in similar circumstances.

[BUCKLEY J. Sect. 38 is not addressed to the contract, but to the liability of the person who induced the contract.]

That shews that the terms of the notice of motion are too wide. We have allotted shares to the plaintiffs, so they can restrain us from acting ultra vires. But we are not doing so. We have only acted as we were bound in honesty to act when we found that the allotment was irregular.

Buckmaster, K.C., in reply.

Cur. adv. vult.

Aug. 12. BUCKLEY J. The defendant company was incorporated in 1897 with a capital of 1000*l.* in 1*l.* shares. In 1898 it increased its capital to 200,000*l.* in 1*l.* shares. Down to May, 1904, it had made no allotment beyond seven shares to the subscribers of the memorandum of association. In 1904 it was minded to offer its capital for subscription. With a view thereto an agreement was on May 12, 1904, executed between the defendant company of the one part and the plaintiff company of the other part, whose effect was that the plaintiff company agreed to pay the expenses of issuing and advertising the prospectus, and agreed to pay for certain things mentioned in art. 3, and in consideration of those payments the defendant company agreed to pay the plaintiff company a sum of money partly in cash and partly in fully paid shares, at certain dates, calculated from the date of the first general

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allotment. That agreement did not in my opinion give the plaintiff company any right to dictate to the defendant company in any way as to going to allotment. If the defendants did not go to allotment, the plaintiffs might have some right in damages. For the purposes of the present application the agreement is, I think, one which gives the plaintiffs no right to the order which they are asking. On May 13, 1904, the prospectus was issued offering 186,000 out of the 200,000 shares at par, payable 1*s.* on application and 1*s.* 6*d.* on allotment. At the head of the prospectus it is stated that "of this issue the directors and their friends have applied for 23,726 shares," and in the body of the prospectus it is stated that "the minimum number of shares upon which allotment will be made is 40,000." On May 20 the company went to allotment and allotted 40,003 shares, of which 5000 were allotted to the plaintiffs. Of these 40,003, the 23,726 shares formed part, and in the 23,726 shares were included the 3000 shares presently mentioned. The facts as to the 23,726 shares which the prospectus stated had been applied for are that 20,726 of them had been applied for in England and the 1*s.* on application paid upon them, and that the directors were told that the remaining 3000 had been applied for in Canada and the application money paid also upon those. The real facts as to the 3000 shares as subsequently ascertained were that the applications were largely for preference shares, whereas the defendant company had no preference shares and was not offering any such for subscription, and that all these applications were made conditional upon an allotment being made by a date prior to the issue of the prospectus—a condition which was not complied with—and, further, that as regards 2425 only of that number had the application money of 1*s.* a share been paid, leaving 575 upon which nothing had been paid on application. The directors learned about June 30, 1904, the fact that upon the 575 shares the application money had not been paid. They immediately took legal advice, and as the result, on July 14, 1904, sent to the allottees the circular of that date, stating that upon the 575 shares the application money had not been paid, and offering the allottees the option of

having the money paid by them repaid and the allotment cancelled. It is stated, though not proved, that the holders of some 24,000 shares availed themselves of this option. This circular went to the plaintiffs, amongst others, and on July 19 they by their solicitors wrote a letter threatening proceedings if the circular was not withdrawn. The directors, conceiving that the course which they had taken was the only honest course open to them, did not accede to this demand; and in the result the writ in the action was issued and notice of motion given on July 22 for an injunction to restrain the defendants from returning the money on the shares and cancelling the allotment.

The question to be decided involves an important point arising upon the Companies Act, 1900. The defendant company is one registered as I have said in 1897, to which, therefore, s. 12 of the Act of 1900 does not apply. It is a company which could not hold a statutory meeting within that section. The definition in s. 5 of the point of time within which an applicant can seek to avoid the allotment is consequently inapplicable to the present case. But for the purpose of construing the Act, I must of course regard the case of all companies to which the Act applies. By reason of the facts which I have stated, the conditions mentioned in s. 4 of the Act of 1900 had not been complied with, for the amount named in the prospectus as the minimum subscription had not been subscribed, and the sum payable on application upon that amount had not been paid. The provision, therefore, of the Act had taken effect that "no allotment shall be made" of the share capital in question. The defendants argue that the result is that the allotment was altogether void. The plaintiffs argue that the result is that the allotment having in fact been made is valid, and the cancellation of the allotment by the company is ultra vires. Is the allotment valid, or is it void, or is it voidable? In my judgment, to say that it is void is to put a wrong construction on the Act. An allotment in breach of s. 4 cannot be void, for s. 5 provides that such an allotment shall be voidable within a certain time and not later. It is, therefore, not a void but a voidable allotment. It is true,

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however, that the time within which s. 5 provides that it shall be voidable is, for the reasons which I have given, not applicable to this case. Under what circumstances then is it voidable in this case, or is it not voidable at all?

Upon this point the plaintiffs argue that it was long ago decided under s. 38 of the Companies Act, 1867, that that section gave rise only to rights as against the directors or others who issued the prospectus, and did not give rise to any right of rescission, and they argue that the same is true of s. 4 of the Act of 1900. They contend that s. 5 of the Act of 1900 is an empowering section creating a right of avoidance in the cases to which it applies, and that, inasmuch as s. 5 cannot apply in the present case, the allotment having in fact been made is valid and cannot be cancelled. This contention, in my judgment, cannot be supported. Sect. 38 of the Act of 1867 is addressed to the representation which induces the contract. Sect. 4 of the Act of 1900 is addressed to an essential constituent of the contract itself. If the allotment be successfully attacked, the contract is gone. A breach of the veto which the Act imposes in certain events upon proceeding to allotment gives rise, I think, to a right of rescission of the contract. Then s. 5 imposes a limit of time within which that right of rescission must be enforced. It is a limit which is not applicable in the present case. It follows, I think, that the voidable contract in the present case remains a contract voidable for breach of the statutory provision that the company shall not go to allotment unless a condition is satisfied which has not been satisfied. I am conscious that this conclusion may have a very far-reaching effect, for, as regards any company registered before the commencement of the Act of 1900, it leaves such a company exposed for an indefinite time to consequences from which companies registered after that date are in a short time relieved by s. 5. Probably the remedy is to be sought in the fact that a small amount of acquiescence after knowledge would bar any right of rescission.

It follows from the foregoing that the plaintiffs have no right to the order which they ask, and have further no right to sue. If the company were acting ultra vires, any shareholder could,

no doubt, enjoin them. But if the act of the company is not ultra vires, but only in breach of a statutory provision whose neglect renders the contract voidable, the plaintiffs have no right to an injunction.

A further point is this. The statement as to the 23,726 shares at the head of the prospectus, though innocently made, was in fact untrue. For the purpose of rescission, the fact that the misrepresentation was innocently made is not material. Upon the general law, apart from the statute, it seems to me that persons who applied upon the faith that that statement was true would be entitled to relief. This goes to shew that, even if the plaintiffs could sue at all, the notice of motion is at any rate too wide. There remains a third point. The words in the prospectus, that "the minimum number of shares upon which allotment will be made is 40,000," form, in my judgment, a condition upon which the applicant makes his application. If that condition is not complied with, he is entitled (if he has done no act to affirm) to repudiate the allotment on the ground that his offer could not be accepted upon terms under which the condition attached to the offer was not complied with. From which again, upon the general law, it would result that he would be entitled to rescission. Upon all these grounds I think that the motion fails, and I dismiss it.

Solicitors: *H. Percy Becher; J. S. Wilkinson.*

H. C. R.

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Aug. 10; *Nov.* 2.

LEWIS *v.* BAKER.

[1904 L. 419.]

Distress—Lessee and Underlessee—Original Lease—Reversionary Lease—Interesse Termini—Underlease exceeding Original Term—Lessee's Right to distrain—Landlord and Tenant Act, 1730 (4 *Geo.* 2, *c.* 28), *s.* 5—*Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 44.

As a reversionary lease merely creates an interesse termini until entry thereunder, it does not enlarge the term of the original lease.

Smith v. *Day*, (1837) 2 M. & W. 684; 46 R. R. 747; *Doe* v. *Walker*, (1826) 5 B. & C. 111; 29 R. R. 184; *Hyde* v. *Warden*, (1877) 3 Ex. D. 72; and *Joyner* v. *Weeks*, [1891] 2 Q. B. 31, followed.

If a lessee with an original lease and a reversionary lease or an agreement therefor underlets the premises for a term exceeding the original lease, he cannot distrain for rent during the original lease either at common law for want of a reversion, or under the Landlord and Tenant Act, 1730, s. 5, or the Conveyancing Act, 1881, s. 44.

Parmenter v. *Webber*, (1818) 8 Taunt. 593; 20 R. R. 575; *Preece* v. *Corrie*, (1828) 5 Bing. 24; 30 R. R. 536; and *Beardman* v. *Wilson*, (1868) L. R. 4 C. P. 57, followed and applied.

WITNESS ACTION.

This was an action for wrongful distress.

On June 30, 1902, the defendant Baker took an assignment of a forty years' lease of 232, Great Portland Street, the term expiring on July 6, 1904.

By an agreement under hand dated May 6, 1902, the reversioner in fee agreed to grant Baker a reversionary lease of the same premises for seventy-three years from July 6, 1904, the expiration of the original lease.

By an agreement under hand dated October 20, 1903, Baker agreed to let the premises to the defendant Haddon for twenty-one years from September 29, 1903, at a rent of 300*l.*, and Haddon thereupon entered into possession. The agreement provided for the execution of a formal lease containing certain covenants and conditions, and also provided that until the execution of the lease the premises should be held by the tenant at the rent aforesaid and subject to the said covenants and conditions. No express right of distress was given.

The plaintiff occupied the upper part of the premises as tenant to Haddon.

On February 19, 1904, Baker distrained the plaintiff's goods for 57*l.* rent due from Haddon at Christmas from the time he took possession.

The plaintiff, who denied Baker's right to distrain on the ground that he had no reversion, claimed damages against the defendants, Baker, Haddon, and the bailiff, for the wrongful distress.

On a motion for an interlocutory injunction it was arranged that the distress should be withdrawn on payment of 55*l.* into court, and 6*l.* 10*s.* the costs of the levy to the bailiff.

The case against Haddon was abandoned, and he did not appear at the trial.

Eve, K.C., and *Beddall*, for the plaintiff. Baker having underleased to Haddon for more than his original term could not distrain for want of a reversion: Brooke's Abridgment, "Dette," pl. 39 (1); *Parmenter* v. *Webber* (2); *Preece* v. *Corrie*. (3) The agreement to grant a lease in reversion, even if regarded as a reversionary lease within *Walsh* v. *Lonsdale* (4), only created an interesse termini which could not ripen into an estate until entry under the reversionary lease. It did not enlarge the term of the original lease: *Smith* v. *Day*. (5)

Micklem, K.C., and *J. Samuel Green*, for Baker. An actual reversion is not necessary to found a right of distress, as neither a tenant nor a sub-tenant can dispute the landlord's

(1) "Et ibidem *conceditur* per Finchden, que si home ad terre pur ans et graunt tout le terme rendant rent, il ne poet distrein."

The "ibidem" is 45 Ed. 3, 8 pl. 10, where Finchden C.J. says: "Si jeo soy seisie [*sic*, see Maitland, Introduction to Year Books of Ed. II. Seld. Soc. 1903, at p. l.] de certain terre, et jeo la lesse a un home a terme dans, rendant a moy xl. livres per annum de chescun terme, javerai briefe de Det, et auxy jeo puisse distrein, mais si jeo nay que un terme des ans, et jeo vous lesse tout mon estate del terme, rendant a moy certain rent, *jeo croy*, que jeo ne puis distrein, si le rent soit aderere. *Sed quære*, per que voiles auter chose dire."

(2) 8 Taunt. 593; 20 R. R. 575.

(3) 5 Bing. 24; 30 R. R. 536.

(4) (1882) 21 Ch. D. 9.

(5) 2 M. & W. 684, 694, 699, 701; 46 R. R. 747.

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title, even if non-existent: *Tadman* v. *Henman*. (1) In such a case there is really a reversion by estoppel.

In the present case, however, there was an actual reversion. The agreement to grant a reversionary lease amounted to a reversionary lease within *Walsh* v. *Lonsdale* (2), and that reversionary lease was ipso facto tacked on to the original lease, making a lease in præsenti for over seventy-three years.

[SWINFEN EADY J. The reversionary lease only gave Baker an interesse termini until entry thereunder, so that there was no estate that could be tacked on to the original lease.]

Baker was already in possession under the original lease, and no fresh entry was necessary. The reversionary lease, therefore, gave him more than a mere interesse termini: *Keyse* v. *Powell* (3); Foa on Landlord and Tenant, 3rd ed. p. 19.

[SWINFEN EADY J. That was not a reversionary lease.]

If there was neither an actual reversion nor a reversion by estoppel, the rent was a rent-seck distrainable under the Landlord and Tenant Act, 1730, which gave "the like remedy by distress . . . . in cases of rents seck . . . . hereafter created, as in case of rent reserved upon lease."

[SWINFEN EADY J. Then why did not the defendants succeed in *Parmenter* v. *Webber* (4) and *Preece* v. *Corrie*? (5)]

The point was not taken in those cases. (6) If, however, this rent was not strictly a rent, it was at all events an annual sum which Baker was entitled to receive out of the land or the income thereof. It was, therefore, distrainable under s. 44 of the Conveyancing Act, 1881. Sub-s. 1 provides that "where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise, not

(1) [1893] 2 Q. B. 168, 170.

(2) 21 Ch. D. 9.

(3) (1853) 2 E. & B. 132, 146, 147.

(4) 8 Taunt. 593; 20 R. R. 575.

(5) 5 Bing. 24; 30 R. R. 536.

(6) It was probably not open to the avowants on the general avowry for rent service: vide *Pascoe* v. *Pascoe*, (1837) 3 Bing. N. C. 898, 905; 43 R. R. 847. The point is very carefully discussed in the note to *Rex* v. *Wilson*, (1829) 5 Man. & Ry. 140, 157; and in Bullen on Distress, 2nd ed. p. 296, Appx. A.

being rent incident to a reversion," he shall have the remedies described in the section "as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further." Sub-s. 2 provides that, "If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof."

It is clear that the agreement with Haddon, even if amounting to an assignment, might have contained an express power of distress for this annual sum, and the section is directly applicable. The exception of "rent incident to a reversion" shews that leasehold rent is an annual sum charged on the land within the meaning of the section, and if there is no reversion the section applies.

J. D. Israel, for the bailiff.

Eve, K.C., in reply. Sect. 44 of the Conveyancing Act, 1881, has no application to the present case. The words "not being rent incident to a reversion" are descriptive of the kind of rent excepted, and clearly exclude rent reserved on a lease or an attempted lease: vide Co. Litt. 93 a, 143 a, 151 b.

Again, the right is to distrain on "the land charged." But leasehold rent is not charged on the land in this sense: *In re Russell*. (1) If the section were applicable, Baker could mortgage Haddon's interest under sub-s. 4, which is an impossible supposition.

Cur. adv. vult.

Nov. 2. SWINFEN EADY J. (after stating the facts). It was argued that Baker had no right of distress, as that right depends on the existence of a reversion in the lessor, and Baker had no such reversion; that the demise to Haddon was for a longer period than the unexpired residue of the original lease, and, therefore, amounted to an assignment of that term; and that under the agreement of May 6, 1902, for the grant of a reversionary lease, Baker had only an interesse

(1) (1885) 29 Ch. D. 254, 264, 265.

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termini and no estate in the land. It was contended that there was not any merger of the interests held by Baker.

Where a person parts with all his estate in land, as where he purports to demise for a period co-extensive with his own interest, or longer, the transaction is in law an assignment, although purporting to be a demise; an underlease for the whole of the residue of a term is in law an assignment. In Brooke's Abridgment, tit. "Dette," pl. 39, the following proposition is laid down: "If a man hath a term for years, and grants all his estate of the term, rendering rent, he cannot distrain."

In *Parmenter* v. *Webber* (1) the defendant agreed to let two farms to the plaintiff during the residue of the defendant's leases of the same, the plaintiff paying rent half-yearly, at Lady Day and Michaelmas; the plaintiff entered into possession of the farms, and paid rent for a year, but the subsequent rent being in arrear the defendant distrained. It was held by the Court of Common Pleas that the agreement between the plaintiff and defendant amounted in law to an assignment of the defendant's estate, and, although there was a rent reserved upon the face of the instrument, the defendant could not legally distrain, as there was no reversion left in him.

Again, in *Preece* v. *Corrie* (2) the facts were that Thomas White held certain premises for the residue of a term of years which would expire on November 11, 1826, and on September 11, 1826, he let the premises to the plaintiff to hold until November 11, 1826, rendering immediately 270*l*. for rent. This not being paid, the defendant, as the bailiff of Thomas White, distrained, and the plaintiff brought replevin. The Court of Common Pleas held that the distress was illegal, White having no reversionary interest expectant on the term, although an action for debt or assumpsit for the rent reserved might have been maintained.

In my opinion the defendant Baker, having parted with all his estate in the term created by the original lease, had no right to distrain. It was contended that Haddon, as tenant, was estopped from disputing his landlord's title, and that the plaintiff, being a sub-tenant of Haddon, was in the same

(1) 8 Taunt. 593; 20 R. R. 575. (2) 5 Bing. 24; 30 R. R. 536.

position. It is not, however, a case of disputing title, but of denying the right of the landlord to pursue the summary remedy by distress, and both of the cases to which I have referred shew that even as between the two parties to such a transaction there is no estoppel precluding the lessee from questioning the legal right to distrain.

It was further urged that, having regard to the agreement to grant the reversionary lease and to the case of *Walsh* v. *Lonsdale* (1), the defendant Baker must be treated as having on October 20, 1903, a term of years expiring on July 6, 1977, and, therefore, that he had in fact the reversion expectant on the term agreed to be granted to Haddon. This contention is not well founded. Assuming that the reversionary lease had been actually granted, it would not have conveyed any estate to Baker, but he would only have had an interesse termini until entry on or after the date as from which he was entitled to enter into possession under it. *Smith* v. *Day* (2) is a clear authority on this point. There the ground landlord had granted to an undertenant a reversionary lease to commence as from a future date, which was the date of the expiration of the original lease, and it was held that he still had the reversion expectant on the original lease, and was entitled to distrain for rent due under it, and that where a lease is granted to commence from a future date the lessee has thereunder no estate whatever, which remains in the lessor, but a mere interesse termini until after entry under the lease when the date for its commencement has arrived. At p. 694 Parke B. said: "The second lease to commence in futuro was a mere interesse termini. The reversion continued in the lessor till the determination of the first term." And, again, on p. 699: "The second lessee has no interest whatever till the determination of the first lease, except a mere interesse termini. It is clear that no reversion could pass by that deed, since it is a mere interest in futuro."

The nature of an interesse termini was very fully considered in *Doe* v. *Walker*. (3) It was there pointed out that such an

(1) 21 Ch. D. 9.
(2) 2 M. & W. 684; 46 R. R. 747.
(3) 5 B. & C. 111, 118; 29 R. R. 184.

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interest merely gives a right to have the possession at a future time. It is a right, not an estate. The whole estate notwithstanding that right is in the lessor. The right may be granted away as a right, or extinguished by a release, but it cannot be conveyed as an estate. It has all the properties and consequences of a right only, not of an estate. See also *Beardman* v. *Wilson* (1); *Hyde* v. *Warden*. (2)

As therefore the reversionary lease, if granted, would not have conveyed any estate to Baker, he cannot rely upon the agreement to grant it as giving him any reversion. On the expiration or sooner determination of the original lease, the freeholder would have had a right of entry. This point is well illustrated by the case of *Joyner* v. *Weeks*. (3) It was an action for breach of a covenant by a lessee to deliver up the demised premises in repair at the expiration of the lease. Some two years before the expiration of the lease the lessors had granted to a third person a reversionary lease of the same premises at an increased rent, and it was urged that the lessors had therefore sustained no damage by the breach of covenant. The Court of Appeal held that the measure of damages for the breach was not affected by the fact that by reason of the reversionary lease having been granted the lessor was no worse off at the time of action brought than he would have been if the covenant had been performed. Fry L.J. said: "The second lease passed no estate until possession was taken under it. It only gave an interesse termini which would, on possession being taken, become an estate. The lessor had a right of entry on the determination of the first lease. Directly that happened a right of action for damages accrued in respect of the breach of the covenant to yield up in repair. Therefore the lessor's right of action for these damages vested before any estate vested in the grantee of the subsequent lease."

The defendant Baker also relied on s. 44 of the Conveyancing and Law of Property Act, 1881; but that does not appear to me to have any application to the present case. Upon these grounds I am of opinion that at the date of the distress the

(1) L. R. 4 C. P. 57. (2) 3 Ex. D. 72, 83.
(3) [1891] 2 Q. B. 31, 47.

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defendant Baker had not any reversion in the premises, and therefore had not any right of distress as incident thereto; and I decide in favour of the plaintiff that the distress was illegal. The plaintiff is, therefore, entitled to recover against the defendants Baker and the bailiff, and I assess the damages at 50*l*. The plaintiff will have the costs of the action against these defendants. Judgment will be in favour of the defendant Haddon, but without costs, as he did not appear to ask for them.

The 55*l*. in court will be paid out to the plaintiff, but the 6*l*. 10*s*. paid to the bailiff will not be repaid, as I have included that in assessing the damages.

Solicitors: *Marcus Herbert Lewis; A. J. Harman; Solomon Myers.*

G. R. A.

SOOTHILL UPPER URBAN DISTRICT COUNCIL *v.* WAKEFIELD RURAL DISTRICT COUNCIL.

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Aug. 3, 4, 5, 6, 8, 9; *Nov.* 23.

[1902 S. 1935.]

District Councils—Contracts—Water Supply to adjoining District—Sanction of Local Government Board—Particular Area—Penalty Clause—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 61, 174.

Sect. 61 of the Public Health Act, 1875, merely empowers the Local Government Board to sanction the supply of water by the local authority of one district to the local authority of an adjoining district, and does not require them to consider the terms of the agreement between the local authorities.

An agreement for the sale of water by an urban authority to a rural authority does not require a penalty clause under s. 174, sub-s. 2, as that sub-section is confined to cases where work, materials, matters, or things are to be furnished, had, or done to or for an urban authority for a price to be paid by that authority.

WITNESS ACTION.

This was an action to recover moneys due under a water agreement of January 31, 1895, for the supply of water by the plaintiff council to the defendants, the Wakefield Rural District Council, hereinafter called the Wakefield Council.

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SOOTHILL UPPER URBAN COUNCIL v. WAKEFIELD RURAL COUNCIL.

The action raised (inter alia) the question whether this agreement was void for want of the sanction of the Local Government Board under s. 61 of the Public Health Act, 1875, or whether a previous sanction of July 15, 1885, given to the predecessors of the two councils, was sufficient so long as the actual area of supply was the same, although the contemplated area was much larger. It also raised the question whether the agreement was void for want of a penalty clause under s. 174, sub-s. 2.

The facts were as follows:—

On December 24, 1881, the Soothill Upper Local Board (the predecessors of the plaintiff council) and the guardians of the Wakefield Union, acting as the rural sanitary authority (the predecessors of the Wakefield Council), signed a joint application to the Local Government Board for their sanction to the supply of water by the Soothill Board to the Wakefield Union for the parishes of East Ardsley and West Ardsley, contributory places within the Wakefield district. The Soothill Board themselves obtained the water from the Halifax Corporation.

This application was forwarded to the Local Government Board on February 13, 1882, together with a draft of the proposed agreement and a covering letter in which the parishes were described as townships.

On May 13, 1882, the Local Government Board were asked whether they would settle a clause then in dispute, or leave the parties to do so.

On May 15 and 17, 1882, the Local Government Board wrote to the respective parties that they were not aware of any reason why at the proper time their consent should not be given, but that no sanction on their part was required to the proposed terms of agreement, and that they had no power to deal with the dispute in question.

On July 17, 1882, an agreement under seal for a supply of water within certain minimum and maximum limits for East and West Ardsley was entered into for thirty years from June 25, 1883, and water was supplied thereunder without any further sanction from the Local Government Board.

On June 26, 1885, the Soothill Board wrote to the Local

Government Board referring to the previous agreement for the supply of water to the Wakefield Union, as the rural sanitary authority for the district comprising the townships of East and West Ardsley, and stating that it was proposed to increase the supply, and inclosing a copy of the proposed agreement, and asking for the sanction of the Local Government Board thereto under s. 61.

On July 15, 1885, the Local Government Board replied formally sanctioning the supply of water by the Soothill Board to the Wakefield Union "for the benefit of the parishes of East and West Ardsley." This arrangement was carried out by an agreement under seal of September 29, 1885.

Under these agreements, hereinafter called the previous agreements, the minimum and maximum limits from January 1, 1897, to the end of the term were 40,000 to 125,000 gallons a day, and the price was 11*d.* per 1000 gallons up to the first 75,000 gallons a day, and 9*d.* per 1000 gallons above that amount. The maximum might be increased in any year if both parties desired. Within the minimum and maximum limits the actual daily quantity to be supplied in any year was, at the option of the Wakefield Union, exercisable by notice to the Soothill Board in the preceding October, and the Wakefield Union were bound to pay quarterly for that amount or for the minimum quantity when (as was the case during the above period) no notice was given although that quantity might not be taken by them, and were liable to pay interest on payments in arrear.

On November 16, 1889, the Local Government Board sanctioned a supply of water by the Wakefield Union to the Hunslet Union for the township of Middleton, and at the same time forwarded to the Wakefield Union a copy of their letter of July 15, 1885, sanctioning the supply to the Wakefield Union for the benefit of the parishes of East and West Ardsley. This was carried out by an agreement under seal dated November 5, 1890, and made between the Wakefield Union and the Hunslet Union.

On January 14, 1895, the Local Government Board sanctioned a supply of water by the Wakefield Council to the Rothwell

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Urban District Council for the townships of Lofthouse and Thorpe. This was carried out by an agreement under seal dated March 27, 1895, and made between the Wakefield Council and the Rothwell Council. The water was in each case Soothill water.

In 1895 it was proposed to make fresh arrangements in substitution for the previous agreements and to enlarge the area of supply.

By a water agreement under seal dated January 31, 1895, and made between the plaintiff council of the one part and the Wakefield Council of the other part, it was agreed (subject to the sanction of the Local Government Board) that—

1. The plaintiff council should supply and the Wakefield Council should take and purchase water in bulk for a term of thirty years from December 24, 1894, on the terms and conditions and at the price and under the regulations thereinafter set forth.

3. The Wakefield Council should maintain a certain meter-house and meters in working order and condition.

4. The plaintiff council should as from December 24, 1894, during the said term of thirty years (unless prevented by frost or accident or other reasonable cause) be bound to deliver into the said meters, and the Wakefield Council should be bound to take for the supply of their said district, or such part thereof as they might for the time being wish to supply, or any place outside their district which they might contract to supply, the quantities following (that was to say), until certain contemplated means of storage were completed by them (which were never in fact constructed), not less than 100,000 gallons of water per day of twenty-four hours, nor more than 125,000 gallons of water per day of twenty-four hours.

5. Within the maximum and minimum limits aforesaid the actual daily quantity of water to be supplied and taken should be at the option of the Wakefield Council, to be exercised by notice in writing to the plaintiff council in October in each year, stating the quantity required for the subsequent year, commencing on January 1, and if in any year (as invariably happened) the Wakefield Council should neglect to give the

notice, the plaintiff council should be bound to deliver and the Wakefield Council to take during the subsequent year, commencing on January 1, the minimum quantity of 100,000 gallons a day. The Wakefield Council should be bound to pay at the prices thereinafter mentioned for the daily quantities of water that they were bound to take notwithstanding that that quantity might not be actually taken.

6. The price of the water should be $9\frac{1}{2}d.$ per 1000 gallons up to the first 75,000 gallons a day, $9d.$ per 1000 gallons for all water above 75,000 and up to 100,000 gallons a day, and $7d.$ per 1000 gallons for all water above 100,000 gallons a day.

The Wakefield Council should on March 25, June 25, September 25, and December 24 in every year (which days were varied from time to time by special agreement) pay the plaintiff council at the prices aforesaid for the quantity of water for which they were liable to pay under clause 5 in respect of the quarter preceding the day of payment. If any such payment should be in arrear for the space of one calendar month from the day when the Wakefield Council had received from the plaintiff council the account for water delivered, the Wakefield Council should pay interest thereon at 5 per cent. per annum from the said quarterly day until payment, but this provision should not restrict the right of the plaintiff council to require immediate payment after the expiration of the month.

7. If at any time the said meters should cease to indicate correctly, or should be removed for the purpose of repairs, then until they were repaired or replaced the Wakefield Council should be liable to pay for the average daily quantity of water for which they had been liable to pay in respect of the previous three months.

9. The plaintiff council should forthwith apply for the sanction of the Local Government Board to this agreement, and unless within six calendar months from the date thereof that sanction was obtained, or ascertained to be unnecessary, the agreement should be void.

By an agreement of even date between the same parties it was provided that if the sanction was obtained the previous agreements should determine as from December 25, 1894,

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without prejudice to rights accrued before that date, but if the sanction was not obtained within the six calendar months they should remain in full force.

The meter-house and meters above referred to were in the Ardsley district, and close to the Soothill boundary. They were then the property of the Wakefield Council.

On January 28, 1895, the plaintiff council applied to the Local Government Board for their sanction to the water agreement and to the cancellation of the previous agreements. In their reply dated April 2, 1895, the Local Government Board stated that under s. 61 of the Public Health Act, 1875, their sanction was only required to the supply of water by one authority to another, and it was not their practice, therefore, to approve of the agreements entered into by the authorities, and that if the area for which the supply under the new agreement was to be given was the same as or was wholly comprised in the area for which the Board previously sanctioned the supply, no further sanction on the part of the Board was required.

On April 11, 1895, the plaintiff council pointed out that the previous sanction authorized a supply to the Wakefield Union for the parishes of East and West Ardsley, and that the proposed supply was for the whole of the Wakefield Council's district, or such part as the Wakefield Council might for the time being wish to supply, or any place outside the said district which for the time being they might contract to supply. The plaintiff council asked whether the previous sanction extended to the supply under the new agreement, or if not that they might receive the necessary further sanction.

In their reply dated May 22, 1895, the Board stated that it would not accord with their practice to give a general sanction in respect of all the contributory places in the Wakefield Rural District, but they would be prepared to consider applications for that sanction in respect of particular contributory places when the supply was actually to be furnished. The water supply was then continued as before.

By the Ardsley East and West (Constitution of Urban District) Order, 1895, as confirmed by the County of West

Riding of Yorkshire (Ardsley East and West) Confirmation Order, 1895, the townships of Ardsley East and Ardsley West, which were stated to be parishes within the meaning of the Local Government Act, 1888, and contributory places within the meaning of the Public Health Act, 1875, within the Wakefield Rural District, were together constituted an urban district within the meaning of the Public Health Act, 1875, and the Local Government Act, 1894; and as from October 1, 1895, the date when the orders came into operation, all the powers, rights, duties, capacities, liabilities, and obligations, and all property within the urban district thereby constituted relating exclusively to that urban district which under the Public Health Act, 1875, or any Act incorporated therewith, or under the Local Government Act, 1894, were exercisable by or attachable to or vested in the local authority or authorities having, under the Public Health Act, 1875, or any Act incorporated therewith, or under the Local Government Act, 1894, jurisdiction in any district or part of a district which was by the said orders included in the urban district thereby constituted, should, so far as the same related to the district or part of the district so included, pass to and vest in the urban district council of the urban district thereby constituted, provided that all the powers, rights, duties, capacities, liabilities, and obligations, and all such property as aforesaid which, under the Public Health Act, 1875, or any Act incorporated therewith, or under the Local Government Act, 1894, were exercisable by or attaching to or vested in any local authority or authorities having under the same Act jurisdiction in the area thereby constituted an urban district, should continue to be exercisable by and attached to and vested in such authority or authorities until the day of the first meeting of the urban district council for the urban district thereby constituted, and any property or liabilities vested in or attached to the Wakefield Council in relation to the townships thereby constituted an urban district conjointly with the Wakefield district or any part thereof should be a matter for adjustment under s. 62 of the Local Government Act, 1888.

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By an adjustment agreement dated March 24, 1897, and made between the Wakefield Council of the one part and the defendants, the Ardsley East and West Urban District Council (hereinafter called the Ardsley Council), of the other part, it was agreed (inter alia) that the meter-house and meters and the water agreement and the Hunslet and Rothwell agreements should become the sole property of the Ardsley Council, who should be entitled exclusively to all the benefits and be exclusively liable and responsible for all liabilities under those agreements, and should indemnify the Wakefield Council therefrom, and that the parties thereto should use their utmost endeavours to obtain the sanction of the plaintiff council, the Rothwell Council, and the Hunslet Rural District Council (the successors of the Hunslet Union) to such of the clauses of the adjustment agreement as affected the agreement entered into between their respective councils, and until those sanctions were obtained the clauses of the adjustment agreement should be binding as between the parties thereto, who should respectively indemnify the other of them in respect of the liabilities for which they had made themselves exclusively liable.

The adjustment agreement also provided that the Ardsley Council should supply the Wakefield Council with water for Stanley-at-Carrgate in the Wakefield district, and that the respective parties should forthwith apply for the sanction of the Local Government Board to such (if any) of the provisions of the agreement as required their sanction, and provisions requiring that sanction should not be of any validity until it was obtained.

A supply for Stanley-at-Carrgate was subsequently provided. It did not appear that the sanction of the Local Government Board or the plaintiff council was ever obtained to the adjustment agreement, but on December 13, 1898, the Ardsley and Hunslet Councils entered into a fresh agreement for the supply of Middleton, and on June 13, 1899, the Ardsley and Rothwell Councils entered into a fresh agreement for the supply of Lofthouse and Thorpe, the old agreements being respectively cancelled.

On January 16, 1900, the plaintiff council wrote to the

Local Government Board, asking whether they were right in regarding the previous sanction to a supply of water by the Soothill Board to the Wakefield Union for East and West Ardsley as extending to sanction a supply to East and West Ardsley under the water agreement of 1895, so far as that supply was confined to the district of East and West Ardsley.

In their reply, dated February 28, 1900, the Board pointed out that the terms of the order constituting the urban district of Ardsley East and West would seem sufficiently wide to cover the transfer of any powers vested in the Wakefield Rural District Council by virtue of any sanction given by the Board under s. 61 of the Public Health Act, 1875, so far as those powers related to the area formed into the urban district or any part of that area, but stated that they were not prepared to discuss the bearing of any such sanction on the water agreement of 1895, and that it was not their practice in cases under s. 61 to go beyond the actual duty imposed on them by the section, namely, sanctioning the supply of water by the one authority to the other.

On March 8, 1900, the plaintiff council wrote to the Board stating that they gathered that they had still the Board's sanction to the supply of water to the East and West Ardsley Urban District Council, and asking if that understanding was correct.

In their reply, dated March 30, 1900, the Board stated that they had nothing to add to their letter of February 28.

The supply to the Ardsley district was then continued as before, and the Ardsley Council continued the sub-supplies to Middleton, Lofthouse, Thorpe, and Stanley-at-Carrgate.

The defendants having failed to take the minimum quantity of water from June 23, 1899, to March 21, 1902, and having only paid at the water agreement prices for the water actually taken, the plaintiff council sued for the balance and interest. The defendants had taken more than the minimum fixed by the previous agreements.

The defendants, who alleged that the water was supplied at an insufficient pressure for their purposes, submitted (inter

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alia) that the water agreement was invalid, as it had not received the sanction of the Local Government Board under s. 61 of the Public Health Act, 1875 (1), and it did not specify any pecuniary penalty to be paid in case the terms were not duly performed, as required by s. 174, sub-s. 2. They were, therefore, only liable for water actually taken.

(1) The Public Health Act, 1875, provides as follows:—

Sect. 61: "Any local authority for the time being supplying water within their own district may, with the sanction of the Local Government Board, supply water to the local authority of any adjoining district on such terms as may be agreed on between such authorities, or as, in case of dispute, may be settled by arbitration in manner provided by this Act."

Sect. 173: "Any local authority may enter into any contracts necessary for carrying this Act into execution."

Sect. 174: "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed; (namely,)

"(1.) Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority:

"(2.) Every such contract shall specify the work materials matters or things to be furnished had or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed:

"(3.) Before contracting for the execution of any works under the provisions of this Act, an urban authority shall obtain from their surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise:

"(4.) Before any contract of the value or amount of one hundred pounds or upwards is entered into by an urban authority ten days public notice at the least shall be given, expressing the nature and purpose thereof and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same:

"(5.) Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed and their successors and on all other parties thereto and their executors administrators successors or assigns to all intents and purposes: Provided that an urban authority may compound with any contractor or other person in respect of any penalty incurred by reason of the non-performance of any contract entered into as aforesaid, whether such penalty is mentioned in any such contract, or in any bond or otherwise, for such sums of money or other recompense as to such authority may seem proper."

Eve, K.C., and *Edward Clayton*, for the plaintiff council. On July 15, 1885, the Local Government Board sanctioned a supply of water by the plaintiff council's predecessors to the Wakefield Council's predecessors for the benefit of East and West Ardsley, and that is the district actually supplied. This sanction was confirmed so far as necessary by the correspondence subsequent to the water agreement. The fact that the water agreement provided for a wider area is immaterial. The local Government Board were not concerned with the terms of the water agreement, and until a wider area is actually supplied no fresh sanction is necessary.

Again, no penalty clause was necessary.

In the first place, s. 174 must be read with s. 173, and only applies to contracts necessary for carrying the Act into execution: *Attorney-General* v. *Gaskill.* (1) It cannot, therefore, apply to contracts under s. 61, which is merely an enabling section, so that contracts thereunder are not necessary for carrying the Act into execution.

Secondly, s. 174, sub-s. 2, only applies to cases where work, materials, matters, or things are to be furnished, had, or done to or for an urban authority for a price to be paid by that authority. In those cases the penalty is imposed for the benefit of the urban authority.

In the present case the plaintiff council sell the water, and the Wakefield Council, a rural authority, pay the price. The section is therefore inapplicable. If any penalty for non-payment is conceivably necessary, it is in fact imposed by the provision as to interest.

If, however, the water agreement is void, the defendants must pay for the water at the higher prices fixed by the previous agreements.

Micklem, K.C., *R. J. Parker*, and *T. J. C. Tomlin*, for the defendants. Although the Local Government Board were not concerned with the general terms of the water agreement, their sanction thereto was required quoad the area agreed to be supplied. They had to consider whether the plaintiff council could spare the water for the wider area. The 40,000 gallons

(1) (1882) 22 Ch. D. 537.

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minimum under the previous agreements was enlarged to 100,000 gallons owing to the wider area agreed to be supplied.

A fresh sanction was, therefore, necessary, and for want of it the water agreement is void.

The sub-supply to Stanley-at-Carrgate is at any rate outside the area previously sanctioned.

Again, the water agreement was clearly a contract necessary for carrying the Act into execution. It was, therefore, void under s. 174, sub-s. 2, for want of a penalty clause. The imposition of interest on payments in arrear is not a penalty. The Wakefield Council had in fact to do certain works, namely, to keep their meter-house and meters in repair, and there ought to have been a pecuniary penalty for breach of this obligation.

Sub-ss. 1 and 2 of s. 174 are obligatory and not merely directory: *Young & Co.* v. *Royal Leamington Spa Corporation* (1); *Melliss* v. *Shirley Local Board* (2); *British Insulated Wire Co.* v. *Prescot Urban Council.* (3)

The plaintiff council have accepted payment at the water agreement prices, and cannot now demand more. The previous agreements were in fact void for want of a penalty clause.

Eve, K.C., in reply. The sub-supply to Stanley-at-Carrgate cannot invalidate the water agreement as against the plaintiff council, even if they have any right to object, though of course it ought to be sanctioned as between the Ardsley and Wakefield Councils: *Halifax Corporation* v. *Soothill Upper Local Board.* (4)

The area actually supplied under the water agreement is the Ardsley district.

The obligation to repair their own meters, so that they should give correct indications, was merely for the benefit of the Wakefield Council, and certainly did not necessitate a penalty clause.

Cur. adv. vult.

Nov. 23. SWINFEN EADY J. The first question is whether the sanction of the Local Government Board has been given

(1) (1883) 8 App. Cas. 517.
(2) (1885) 16 Q. B. D. 446.
(3) [1895] 2 Q. B. 463, 538.
(4) (1874) 30 L. T. 513; 31 L. T. 6.

to the plaintiff council to supply water to the Wakefield Council, the local authority of an adjoining district. The plaintiff council contend that the sanction has been duly given. The defendants deny it. To determine this point it is necessary to go back to the year 1881. [His Lordship then stated the facts and correspondence relating to the previous agreements down to the sanction of July 15, 1885, authorizing a supply to the Wakefield Union "for the benefit of the parishes of East and West Ardsley," and continued:—]

This sanction has never been withdrawn. Although the words "for the benefit of the parishes of East and West Ardsley" are added to the formal sanction, there does not appear to be any statutory power to prescribe the use which the Wakefield authority is to make of the water when obtained. Sect. 61 merely requires the sanction of the Local Government Board to the supply of water by one authority to another, and the Board gave its sanction to the Soothill authority supplying the Wakefield authority. [His Lordship then referred to the sanctions to the sub-supplies to the Hunslet Union and the Rothwell Urban District Council, and continued:—]

Thus far everything was done with the sanction of the Local Government Board so far as that sanction was requisite.

In 1895 the successors of the Soothill and Wakefield authorities negotiated a new water agreement, which is dated January 31, 1895, and is the one sued on. This agreement contemplated supplying a wider area than the previous agreements. [His Lordship then read the correspondence with the Local Government Board in reference to this agreement, and continued:—]

Under these circumstances it seems to me to be clear that the supply of water by the plaintiff council has been sanctioned by the Local Government Board, whether it is to be treated as a supply to the Wakefield authority or as a supply direct to the urban district of Ardsley East and West, and that is the only supply that I have to consider in this action. The Local Government Board were certainly acting within their rights in refusing to consider any particular agreement and in confining themselves to the actual duty imposed on them by s. 61,

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and, in my opinion, the correspondence shews that the sanction of the Board was obtained for the supply of water by the plaintiff council to the local authority of the adjoining district whether Wakefield or Ardsley.

The second objection taken by the defendants to the validity of the water agreement of 1895 is the absence of any pecuniary penalty, under s. 174, sub-s. 2, of the Public Health Act. Assuming that this sub-section is obligatory, and not merely directory (see *Young & Co.* v. *Royal Leamington Spa Corporation* (1) and *British Insulated Wire Co.* v. *Prescot Urban Council* (2)), it applies only to contracts made by an urban authority, and, therefore, it has to be considered how far the plaintiff council, who are an urban authority, are affected by it; the Wakefield Council are a rural authority, and, therefore, not bound by any such provision. The provisions of s. 174 are for the protection of an urban authority and of the ratepayers of their district. The penalty in sub-s. 2 is a penalty to be made payable "to" and in no case "by" the urban authority, in case the terms of the contract are not duly performed—that means, not duly performed by the other party. The "price to be paid" is a price to be paid by the urban authority for the work, materials, matters, or things to be furnished, had, or done, to or for the urban authority. Accordingly this sub-section can, from the nature and terms of it, only apply to cases where work, materials, matters, or things are to be furnished, had, or done to or for an urban authority, for a price in money to be paid by the urban authority. In those cases the contract is to specify the time within which the contract is to be performed, and is also to specify some pecuniary penalty. The provisions of sub-ss. 3 and 4 of s. 174 also shew that the section refers only to contracts where the money is to be paid by the urban authority, and does not include cases where the contract is to be carried out by the urban authority, and the consideration paid to them. In the present case, it is the urban authority—the plaintiff council—who are to supply water to the rural authority for a price in money to be paid to the urban authority. Must the

(1) 8 App. Cas. 517. (2) [1895] 2 Q. B. 463, 538.

urban authority stipulate that, if they do not carry out the terms of the contract—that is, if they do not supply the water—they shall themselves pay a penalty? This is absurd. Are they, then, to stipulate that if the purchasers do not pay the price in money they shall pay some pecuniary penalty? Obviously not, for the penalty is to be paid in case the contract is not duly performed within the stipulated time, and not if the price is not paid. Here the urban authority have, in fact, stipulated that, if the price is not punctually paid, interest thereon at 5 per cent. shall be paid, and it might be contended that this is sufficient penalty within the meaning of the statute; but the real answer to the argument is that the present contract for the supply of water by an urban to a rural authority is not within the section at all.

[His Lordship then dealt with other points of the case, and in the result gave judgment for the amount claimed against the Ardsley Council, who it was agreed were the parties ultimately liable to pay.]

Solicitors: *Jaques & Co., for Scholefield, Taylor & Maggs, Batley; Barton & Pearman, for Scatcherd, Hopkins & Middlebrooks, Leeds.*

G. R. A.

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Oct. 26.

In re MANSER.
ATTORNEY-GENERAL *v.* LUCAS.

[1904 M. 1667.]

Will—Legacy—Charity—Repair of Burial Grounds—Restriction to Members of a particular Sect—Advancement of Religion.

A bequest for the purpose of keeping in good order burial grounds the use of which is restricted to members of the Society of Friends is a gift for the advancement of religion and, therefore, a valid charitable legacy.

ADJOURNED SUMMONS.

Mr. Alfred Manser, a member of the Society of Friends, commonly called Quakers, by his will gave various legacies, and proceeded as follows: "And as to all the rest residue and remainder of my estate and effects both real and personal I give, devise, and bequeath the same to the said Edmund Lucas and George Bell Gripper upon trust to pay the following legacies and annuities, that is to say, to pay to the Hertford and Hoddesdon Preparative Meeting the sum of 1000*l.*, I directing that the meeting shall appoint five of their members to receive and give a receipt for the same, and that the same shall be invested by the five members and the interest applied by them under the order of the said preparative meeting for the sole purpose of keeping in good order the existing burial grounds under the care of the meeting, and in particular the grave of my late wife." By a codicil the testator gave his ultimate residuary estate to his brother Henry Manser.

The testator died on October 27, 1902, and Henry Manser died on January 31, 1904.

The existing burial grounds under the care of the preparative meeting were: (1.) Cottered (now disused), which John Exton, by his will dated December 9, 1710, gave unto all Christian people to bury their dead frank and free without money and without price, so long as the world should endure; and he appointed certain persons as feoffees in trust to see the said burying place kept and preserved in a Christian and decent manner.

(2.) Hoddesdon, a piece of land with a meeting-house built on part of it, which was by indenture of release dated January 13, 1829, conveyed to trustees upon trust for sale, and in the meantime for such purposes as the persons for the time being assembling as the monthly meeting of Friends, commonly called Quakers, for the town of Hertford should direct, and subject as aforesaid upon trust to permit the same premises to be used as a meeting-house and burial ground for the use and accommodation of the Society of Friends, subject to regulations to be made by the meeting.

(3.) Hertford, a piece of arable land then used as a burying place by the people called Quakers, which with a meeting-house was conveyed in 1784 to trustees upon trust at all times to suffer the said land, burying place, and premises to be kept and used as a public burying place for the people called Quakers which should inhabit in or near the town of Hertford in such manner as the same had been used and kept.

(4.) Ware (now disused), a piece of land which in 1728 was, with a meeting-house standing on part of it, conveyed to trustees upon trust that the same should at all times be used as a place of burial of and for the Protestant dissenters called Quakers inhabiting in and residing near the town of Ware.

The preparative meeting appointed five of their members to receive the legacy, but the executors were advised that the legacy was probably void and declined to pay it. A lengthy correspondence took place, and eventually this summons was taken out by the Attorney-General, to whom the question of the legacy had been certified by the Charity Commissioners, asking that the executors might be ordered to pay the legacy to the preparative meeting.

E. Beaumont, for the summons. This is a valid charitable trust although it is restricted to the benefit of the members of a particular society. It is true that all the other grounds are for the benefit of Quakers only, but the Cottered ground is held for the use of all Christian people, and the Hertford ground is to be used as a "public" burying place for the people called Quakers. Those trusts are sufficiently for the benefit of the

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public to support this legacy. There is no case on the subject of burial grounds provided for dissenters. The principle is, however, clearly indicated. In *Attorney-General* v. *Pearce* (1) it is said to be almost impossible to say which are public and which are private charities in their nature. In *Attorney-General* v. *Lawes* (2) Wigram V.-C. says that a bequest is not the less a charitable bequest from the fact that it is given for the benefit of a limited class of persons. A trust of property in favour of a parish or the parishioners can be upheld on the ground that it is a charitable trust: *Attorney-General* v. *Webster* (3); or in favour of the inhabitants of a borough: *Goodman* v. *Saltash Corporation* (4); *In re Christ Church Inclosure Act* (5); or in favour of the children of deceased railway servants: *Hall* v. *Derby Sanitary Authority.* (6)

A cemetery may be the subject of a charitable gift: *Attorney-General* v. *Blizard.* (7) Land purchased under statutory authority for a burying ground of the Established Church is a charity: *In re St. Pancras Burial Ground.* (8) A very small number of recipients of the charity are sufficient: *In re Rogerson.* (9) A trust to keep in repair a church, or even the ornaments of a church, is good; therefore a gift to keep in repair the churchyard round the church is good: *In re Vaughan.* (10)

H. Terrell, K.C., and *A. D. Tyssen*, for the representatives of Henry Manser, the residuary legatee. To be a good charitable legacy a gift for the repair of a burial ground must come within one of the four classes mentioned by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (11) It must be a trust for the relief of poverty, for the advancement of education, for the advancement of religion, or for other purposes beneficial to the community. This is obviously not within the first two heads. We submit further that it is not for the advancement of religion. A gift for keeping up a meeting-house would be

(1) (1740) 2 Atk. 87.
(2) (1849) 8 Hare, 32, 41.
(3) (1875) L. R. 20 Eq. 483, 491.
(4) (1882) 7 App. Cas. 633, 642.
(5) (1888) 38 Ch. D. 520, 531.
(6) (1885) 16 Q. B. D. 163.
(7) (1855) 21 Beav. 233.
(8) (1866) L. R. 3 Eq. 173.
(9) [1901] 1 Ch. 715.
(10) (1886) 33 Ch. D. 187, 192.
(11) [1891] A. C. 531, 583.

good, but Quakers do not hold any settled religious service on the occasion of a funeral. A gift for a private burial ground would be void: *Yeap Cheah Neo* v. *Ong Cheng Neo.* (1) The distinction between public and private burial grounds is shewn by *Reg.* v. *Burial Board of Bishop Wearmouth.* (2) In order to come within the fourth class a trust must be for the benefit of the public generally. The cases shew that a trust for the inhabitants of a particular parish may be a public general trust. It may be limited in area provided that it is open to the public within that area. But a trust for the benefit of the members of a particular society such as a club or a friendly society is not a charity: *In re Clark's Trust.* (3) The Society of Friends is simply a club.

A burial ground belonging to the Church of England is in a different position. It is within the Church Building Act, 1803, which enables land to be given for burial grounds, and money not exceeding 500*l.* to be given for the repair of churchyards. Without that Act such a gift would not be valid, and it does not apply to Quakers. The gift in *In re Vaughan* (4) for repairing the parish churchyard was only supported on the ground that it was legalized by the Act. If the applicant is right the decision in *In re Vaughan* (4) need not have been given; it would have been enough to say that there was a good charitable trust. The judgment shews that the fact that it was a burial ground was not enough to make it a charity. The question is whether the trust is for the benefit of the public or is confined to the members of a particular society. There is no case in which a gift of a burial ground for dissenters has been held to be a public charity. The fact that the rates may thereby be relieved is immaterial.

The gift is for the repair of existing burial grounds; and disused grounds cannot be considered. The fact that the Cottered ground was given to all Christian people is, therefore, of no importance.

The gift for the repair of his wife's grave is clearly void. It is not a mere addition to a valid charitable gift.

(1) (1875) L. R. 6 P. C. 381.
(2) (1879) 5 Q. B. D. 67.
(3) (1875) 1 Ch. D. 497.
(4) 33 Ch. D. 187.

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Cann, for the executors.

M. Romer held a watching brief for the preparative meeting. No reply was called for.

WARRINGTON J. The question I have to decide is whether a legacy contained in the will of Alfred Manser is valid or not. The legacy is in these terms: "To pay to the Hertford and Hoddesdon Preparative Meeting the sum of one thousand pounds, I directing that the meeting shall appoint five of their members to receive and give a receipt for the same, and that the same shall be invested by the five members and the interest applied by them under the order of the said preparative meeting for the sole purpose of keeping in good order the existing burial grounds under the care of the meeting, and in particular the grave of my late wife." The effect of that bequest is simply to give a sum of money to trustees to be applied by them under certain directions for the purpose of keeping in good order some burial grounds, "and in particular the grave of my late wife"—which I suppose was situated in one of the burial grounds.

The question I have to determine is whether that is a good charitable gift. It turns on this. Is a gift of money for the purpose of providing a burial ground a good charitable gift? Because, if it is, it seems to me that a gift of money for the purpose of keeping such a burial ground in order would also be a good charitable gift. It has to be borne in mind that in this particular case the burial grounds were provided as burial grounds for the Society of Friends. I am aware that that is not quite an accurate statement, because one of the burial grounds referred to in the evidence was provided for the burial of "all Christian people"; but I put that particular burial ground out of the question as if it did not exist, and I repeat that, for the purpose of the question which I have to decide, the burial grounds for the keeping in good order of which this legacy was given are burial grounds provided for the benefit of the Society of Friends.

Now is a gift of a burial ground for the benefit of the Society of Friends a good charitable gift? In my opinion it is.

Lord Macnaghten says in the case of *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), after referring to the popular meaning of the word "charity" and its legal meaning, "How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Then he goes on: "The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly." Now, in my opinion, a gift of money for the purpose of providing, or, as in this case, for the purpose of keeping in good order, a burial ground, though that burial ground may not be a parish churchyard, and though it may be connected with the meeting-house of, or for the benefit of members of a particular religious community, may be supported as a gift for the advancement of religion, and therefore a good charitable gift. The question has been argued as if a gift of money for this purpose was merely a gift of money to certain individuals associated as a club for some purpose of their own; but I do not regard it in that light. There can be no doubt that a gift of money to be invested in the purchase of land or in the purchase of a building to be used as a chapel or meeting-house for the purposes of a particular Christian denomination would be a good charitable gift, as would be also money to be expended in the maintenance or "keeping in good order"—to use the words in this will—of such a building. The same would be true of the ornaments of the building and the furniture or things necessary for the celebration of worship of whatever form conducted in that building. It seems to me that it is impossible to distinguish between money given for any of those purposes and money given for the purpose of providing or keeping in repair a burial ground, which I think most people would regard as ancillary to a building

(1) [1891] A. C. 531, 583.

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devoted to religious purposes in the way I have mentioned. I think one naturally connects the burial of the dead with religion. I may be wrong in that view, but it is the view that I take, and I think this gift can be supported in that way. It was said that that was not so—that there was no authority in support of that view, and that, so far as there was any authority, it tended the other way. In support of that argument the case of *In re Vaughan* (1) was referred to. That was a case of money given for the repair of a churchyard, and the question arose whether money so given was validly devoted to charitable purposes. North J. found that it was. He found a good reason in his mind for so holding in the words of the Church Building Act, 1803, and he decided it on the words of that Act. It does not at all follow that if he had been driven to do it he would not have decided in the same way on other grounds, and I cannot see, therefore, that the case is any authority against the view which I have just expressed. But I think that he did decide it on the broader ground. If one looks at the passage which Mr. Beaumont referred to on p. 192, where the learned judge sums up what he had been saying in reference to the Church Building Act, I think one can see what his true view was. He says: "To put it shortly, I do not see any difference between a gift to keep in repair what is called 'God's house,' and a gift to keep in repair the churchyard round it, which is often called 'God's acre.'" That is the ground on which I think this case, as I have already said, can be decided in favour of the legacy; and I think North J. took the same view. What really was the effect of the Church Building Act as applied by him? I think it was only this: that the Legislature, dealing with gifts for the purpose of providing churches, and, amongst other things, churchyards, regarded the persons who were providing the money for that purpose as charitably disposed. I do not think it was anything more than that. I do not think he regarded it as an enactment that the purchase or provision of a churchyard should be regarded as a charity. He merely took it that the Legislature, expressing the popular view of what would be the disposition of such people, treated

(1) 33 Ch. D. 187.

those people as charitably disposed. He only regarded the Act as supporting that view, and he put it in those words which I have read from p. 192. If that is so, there is no further question about it. It is admitted that a gift to keep in repair a Quaker's meeting-house would be a perfectly good gift. If so, on this view a gift to keep in repair a Quaker burial ground would be a perfectly good gift.

I need not go into any general considerations as to the necessity or as to the pious object of providing burial grounds. I decide this question on the ground I have expressed, and I do not think, therefore, it is necessary to consider whether this is a general public trust or not. It comes within the now very wide definition of "charity," and in particular that branch of it which is concerned with the advancement of religion. I think, therefore, the gift is good.

With regard to the minor points that have been referred to, I really do not think they arise, because it is common ground that there are burial grounds now existing under the control of this preparative meeting. If at any time it turns out that the money is not wanted for application in the way in which the testator has prescribed, it does not affect the present question, and it will have to be the subject of an application later. In my opinion the legacy is valid. There is one point which I have not dealt with, and that is with regard to the words "in particular the grave of my late wife." I regard those words as nothing more than a special obligation ancillary to the repair of the burial grounds, and not as a separate trust at all.

There will be a declaration that the legacy is valid, and a direction that it shall be paid with interest at 4 per cent. to the five members of the preparative meeting upon production of evidence of their appointment.

Solicitors: *Treasury Solicitor; Horsley & Weightman; R. C. Swaine, for H. S. Hawks, Hertford.*

H. C. R.

WARRINGTON J.

1904

Nov. 3.

In re HORNE.
WILSON *v.* COX SINCLAIR.

[1904 H. 2315.]

Trustee and Cestui que Trust—Administration—Tenants for Life—Overpayments—Adjustment—Trustee also a Beneficiary—Right to impound.

Where a trustee, who was himself one of the beneficiaries, had inadvertently overpaid the other beneficiaries their shares of income, and died before any adjustment had been made:—

Held, that the executors of the deceased trustee were not entitled to recover from the other beneficiaries the amounts so overpaid, or to have accrued or future income impounded till the shares were equalized, by reason of the fact that their testator himself was the person responsible for the mistake that had been made.

ADJOURNED SUMMONS.

The question raised by this application was whether the executors of a beneficiary, who had been underpaid his share of the income of a trust fund, were prevented from recovering the amount from the other beneficiaries by the fact that their testator was also the trustee who had made the overpayments. The facts, so far as material, were as follows:—

Swithin Horne, who died in August, 1886, gave and bequeathed nine leasehold messuages to his trustees upon trust to keep in repair and to let and manage the same in their discretion, and, after payment of ground-rents and all other necessary outgoings and an annuity to his daughter, the testator directed his trustees to pay the residue of the net rents and profits unto and amongst his three sons, Richard, William, and Edwin, as tenants in common during their respective lives, or until they should assign, charge, or alienate the same, and after the decease of any of his said sons to hold one equal third part of the said messuages and all accumulations of income thereof in trust for such person as such son should by will appoint, and in default of such appointment, in trust for the next of kin of such son. The testator also directed his trustees not to sell the said messuages, but to retain them to the last day of the terms for which they were respectively

held, and appointed his son Richard one of the executors and trustees of his will. Richard Horne was the acting trustee of the will; he personally managed the estate, received the rents, and kept the account of the trusts down to the time of his death in August, 1903, making payments out of the net income to his brothers every year for or on account of their respective shares, retaining a portion for himself. Shortly after the death of Richard Horne it was discovered from his accounts that he had been in the habit of making payments to his brothers in round sums which were not exact thirds of the income received, nor were they uniform in amount or dates of payment; one brother appeared to have received a small sum monthly, and the other a larger sum, approximately corresponding in total amount, once or twice a year, while Richard Horne had appropriated for himself various sums at irregular intervals, with the result that during the seventeen years since the testator's death William Horne and Edwin Horne had been overpaid to the extent of 99*l.* 3*s.* 4*d.* and 83*l.* 3*s.* 4*d.* respectively, so that Richard Horne had altogether underpaid himself to the extent of 182*l.* 6*s.* 8*d.* It appeared that Richard Horne was much better off than his brothers, and it was admitted that as trustee he had made no mistake of fact with regard to these payments.

The executors of Richard Horne claimed this sum of 182*l.* 6*s.* 8*d.* as part of the estate of their testator, and asked for an adjustment.

The plaintiff, as the surviving trustee of the will of Swithin Horne, still held leasehold messuages of the estimated value of 2500*l.*, and a sum of 118*l.* 16*s.* 3*d.*, representing net rents, of which the sum of 33*l.* 11*s.* 10*d.* had accrued prior to the death of Richard Horne. The plaintiff accordingly took out an originating summons against the executors of Richard Horne and Edwin Horne for the determination of the question whether he ought to pay or allow to the executors of Richard Horne the sum of 182*l.* 6*s.* 8*d.*, and, if so, whether out of capital or income.

H. C. Bickmore, for the surviving trustee of the will.

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E. S. Cox-Sinclair, for the executors of Richard Horne. The estate of Richard Horne is entitled to an adjustment in respect of these overpayments, which, now that they have been discovered, ought to be made good either out of the accrued or accruing income of the other brothers, or if necessary the amount can be charged against their respective shares in the corpus of this fund. Any member of a family who has obtained possession of any portion of a trust fund to which he is not entitled can be compelled to repay it at the suit of another cestui que trust: *Harris* v. *Harris* (*No.* 2). (1) Where a trustee has paid to some of the beneficiaries sums to which they are not entitled, it is for the Court to enforce the execution of the trusts by recovering back the sums thus received contrary to the trusts: *Dibbs* v. *Goren*. (2) The other brothers having been overpaid, a deduction or impounding of accrued and accruing income should be made until the payments have been adjusted: *Livesey* v. *Livesey*. (3)

Forder Lampard, for Edwin Horne. It is admitted that the trustee here has made no mistake of fact with regard to these overpayments; he appears to have been careless and inaccurate only. It is clear, therefore, that Richard Horne in his lifetime could not have recovered these overpayments from his brothers, and his representatives cannot be in any better position than their testator.

[WARRINGTON J. You must admit that if Richard had not been a trustee, but merely one of the beneficiaries, these overpayments would have to be adjusted.]

Certainly; but the fact that Richard was the trustee who made the overpayments differentiates this case from the authorities cited. The trustee has no right to impound income to make good the overpayments: *Ballard* v. *Marsden*. (4) The equitable right of a creditor to make a legatee refund must be affected by the course of conduct of that creditor, which may make it highly inequitable for the Court to allow him to assert any right: *Ridgway* v. *Newstead*. (5) Any

(1) (1861) 29 Beav. 110.
(2) (1849) 11 Beav. 483.
(3) (1827) 3 Russ. 287.
(4) (1880) 14 Ch. D. 374.
(5) (1861) 30 L. J. (Ch.) 889.

difficulty that has arisen here has been caused by Richard Horne's own laches; the right to readjustment ought to have been claimed long ago; the inconvenience caused to the legatees now, if their income is to be impounded, must also be considered: they ought not to be required to repay sums received by them in good faith which they had every right to consider were their own moneys paid to them as yearly income. The present claim cannot be supported either at law or upon equitable grounds, and should be refused.

Cox-Sinclair, in reply. The fact that Richard was a trustee as well as a beneficiary ought not to be allowed to deprive him of his right in his capacity of beneficiary to recover these overpayments.

[WARRINGTON J. The point against you is that it is inequitable to make these overpaid beneficiaries refund at the instance of a trustee who is himself the cause of the mistake; if their income is stopped, the inconvenience so caused to the beneficiaries is brought about by the conduct of the trustee.]

Mere laches as trustee ought not to deprive Richard as one of the beneficiaries of his right to an adjustment. The inconvenience to beneficiaries who have been overpaid is just the same whether their income is stopped at the suit of a beneficiary or at the instance of a trustee. Inconvenience, therefore, is no ground for refusing relief.

WARRINGTON J. This is a somewhat curious case; the exact point I have to decide does not seem to be covered by any of the authorities cited. [His Lordship having stated the will of Swithin Horne, and the facts as to the distribution of the net income of the leaseholds as set out above and the questions raised by the summons, continued:—]

If Richard Horne had not been himself a trustee, but only one of the beneficiaries, the case would be plainly covered by authority, and it would now have been the duty of the plaintiff, as the surviving trustee of this will, in administering the trusts of it for the future, to equalize the payments which have been made out of income. That proposition is established by the three cases referred to by Mr. Cox-Sinclair of *Harris* v.

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Harris (*No.* 2) (1), *Dibbs* v. *Goren* (2), and *Livesey* v. *Livesey* (3); perhaps the point is most clearly put in *Dibbs* v. *Goren* (2); but in the present case we have the fact that the person claiming a readjustment is the trustee himself. This fact introduces into the present case an element of an essential character which was absent in the authorities to which I have been referred. When a trustee comes to the Court to have an account adjusted upon the ground that he, being also one of the beneficiaries, has paid himself too little, one must consider what will be the effect of the proposed adjustment upon the other beneficiaries, and particularly with reference to the great inconvenience that may be caused to them if the claim is allowed and their income has to be impounded to make good the deficiency to the trustee beneficiary. Here there are three beneficiaries, Richard, William, and Edwin; let me assume that the first of these to die is Richard Horne, the trustee. Richard's executors after his death come and say to William and Edwin, "You have been receiving a great deal more income than you were entitled to; we the representatives of Richard, who has paid you too much, must have your future income stopped until Richard's estate has been repaid what he has overpaid you": this would be very inconvenient, and a great hardship on the other legatees. The same inconvenience and hardship arises where an adjustment is thus made at the suit of a beneficiary, but in that case the beneficiary is not the person responsible for the mistake which causes the inconvenience. In the present case it is the trustee who claims an adjustment, and he is the person responsible for the mistake that has been made. Upon what principle can it be said that the trustee is entitled to recover? I can see none at all. Having regard to the circumstances here, and the mode of payment, it is clear that Richard Horne made no mistake; he seems to have made these payments without any exact reference to the actual amount of the income of these leaseholds, but there was no mistake of fact, and therefore he clearly cannot recover them at law. Can he recover

(1) 29 Beav. 110. (2) 11 Beav. 483.
(3) 3 Russ. 287.

in equity? Can he call upon the other beneficiaries to repay him the amount which he has overpaid to them, or has he any equity to impound their accruing income till he has repaid himself? I am of opinion he has no such right. Any equity that he might have had in his character of beneficiary is displaced by the fact that he is himself responsible for the mistake which has been made. As was said in *Ridgway* v. *Newstead* (1), the right of a creditor to make legatees refund may be affected by the course of conduct of that creditor; and in the present case I think that, not only has the trustee no equity to entitle him to the interference of the Court, but that the course he has adopted makes it highly inequitable for the Court to allow him to assert any right against these beneficiaries who were themselves perfectly innocent, and were only receiving what was paid to them in good faith and under the belief that it was the amount to which they were properly entitled by the terms of this will. I must, therefore, make a declaration that the surviving trustee of the will of Swithin Horne ought not to repay or allow to the executors of Richard Horne the sum of 182*l.* 6*s.* 8*d.*, being the amount appearing on the accounts to have been overpaid; the other questions raised by the summons do not now arise. In my opinion, this was quite a proper case for the opinion of the Court: the plaintiff as trustee was bound to come and have this question decided; and therefore, following the practice which I have adopted in these cases, I shall direct that the costs of all parties as between solicitor and client may be paid out of the estate.

Solicitors: *Walter A. Jennings; J. Arscott Bartrum.*

(1) 30 L. J. (Ch.) 889.

W. C. D.

WARRINGTON J.

1904

Nov. 17, 18.

In re TRENCHARD. TRENCHARD *v.* TRENCHARD.

[1904 T. 327.]

Will—Construction—Annuity—Charge on Land—Specific Devise—Legacy—Testamentary Expenses—Estate Duty—Mixed Fund—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1; *s.* 14, *sub-s.* 1.

By his will the testator gave to his wife so long as she should remain his widow an annuity of 500*l.*, and he declared that this annuity should be a first charge on all his freehold properties at Greenwich. He gave various legacies, and then devised and bequeathed all his real and personal estate not thereby otherwise disposed of upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses and debts and legacies, and to stand possessed of the residuary trust moneys upon certain trusts.

The Greenwich property passed to the trustees under the residuary devise:—

Held, that, upon the true construction of the will, the annuity was not a rent-charge, but was a personal annuity secured by a charge on the Greenwich property, and the estate duty on it must be paid by the executors as testamentary expenses.

The statement in Theobald on Wills, 5th ed. p. 442, that "a gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable," is accurate only in cases where, upon the construction of the particular will, the gift must have that effect.

Mr. Edward Penny Trenchard by his will dated November 20, 1897, appointed executors and trustees, and gave some legacies to his wife, and proceeded (clause 5): "I give unto my said wife so long as she shall remain my widow an annuity of 500*l.* payable by equal quarterly instalments the first at the expiration of three calendar months after my decease and I declare that the said annuity shall be a first charge on all my freehold properties situate at Greenwich in the county of Kent." He then gave some other legacies; and clause 7 was as follows: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees upon trust subject nevertheless to the powers and directions hereinafter contained to sell call in and convert into money the same

or such part thereof as shall not consist of money and with and out of the moneys produced by such sale calling in and conversion and with and out of my ready money to pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil thereto and to stand possessed of the said residuary trust moneys and the investments for the time being representing the same hereinafter called 'my residuary estate' upon and subject to the trusts powers directions and conditions hereinafter contained."

The testator died on April 3, 1899. His Greenwich property was not specifically devised, but passed under clause 7.

This was a summons taken out by the widow to determine the question whether the estate duty payable on the testator's death ought to have been provided for out of the proceeds of the sale and conversion of his residuary real and personal estate, or whether any and what proportion thereof or the interest thereon ought to be borne by the plaintiff, or charged upon her annuity of 500*l.* bequeathed by clause 5 of the will.

Rowden, K.C., and *J. Bradford*, for the widow. The testator has directed that his testamentary expenses should be paid out of a mixed fund of realty and personalty. Testamentary expenses include the estate duty on the annuity of 500*l.* given to the plaintiff, unless that is really not a personal annuity, but a specific devise of real estate: *In re Jolley*. (1) We submit that this is an ordinary annuity payable out of personal estate, and the estate duty on it is a testamentary expense: *In re Clemow* (2); *In re Treasure* (3); *In re Fearnsides*. (4) It is not a specific devise of a portion of the Greenwich property: Theobald on Wills, 5th ed. p. 129. If it were so, it would no doubt have to bear a share of the duty, for estate duty on real estate is not included in testamentary expenses; not even since the Land Transfer Act, 1897: *In re Sharman*. (5)

H. Terrell, K.C., and *E. Clayton*, for the trustees and residuary legatees. We do not agree that the question is

(1) (1901) 17 Times L. R. 244.
(2) [1900] 2 Ch. 182.
(3) [1900] 2 Ch. 648.
(4) [1903] 1 Ch. 250.
(5) [1901] 2 Ch. 280.

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whether the annuity is a specific devise or not. The real question is whether the annuity is primarily payable out of the real estate. If this annuity did not pass to the executors "as such" within s. 9 of the Finance Act, 1894, the estate duty is a charge on the property itself. The annuity is primarily payable out of the Greenwich property, and the personal estate is only liable if that property is insufficient. Except in that case, it is not payable out of property which comes to the executors as such. This is a first charge on a particular estate. That is enough to make it a legal rent-charge payable out of that estate: *Ramsay* v. *Thorngate*. (1) The property could only be sold subject to the annuity: Dart on Vendors and Purchasers, 6th ed. p. 691; White and Tudor's Leading Cases, 7th ed. vol. ii. p. 896. It is "otherwise disposed of" within clause 7 of the will. It is said in Theobald on Wills, 5th ed. p. 442, that a gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable. That is a correct statement of the law, but we do not have to go so far. We only have to shew that this annuity is primarily payable out of the Greenwich property, and did not come to the executors as such.

[WARRINGTON J. The statement in Theobald on Wills at p. 442 is inconsistent with the observation at p. 129, that a gift of an annuity with a mere charge on land is not specific.]

It is supported by some of the authorities which are cited. *Lomax* v. *Lomax* (2) does not touch the point, nor does *Shipperdson* v. *Tower*. (3) But *Patching* v. *Barnett* (4), *Buckley* v. *Buckley* (5), and *In re Waring* (6) shew that the statement is accurate. It is immaterial that express powers of distress and entry are not given to the annuitant here, as was the case in those authorities, for by s. 44 of the Conveyancing Act, 1881, those powers are given to all owners of rent-charges.

(1) (1849) 16 Sim. 575.
(2) (1849) 12 Beav. 285, 290.
(3) (1842) 1 Y. & C. Ch. 441; 57 R. R. 421.
(4) (1881) 51 L. J. (Ch.) 74.
(5) (1887) 19 L. R. Ir. 544.
(6) [1896] 1 I. R. 427.

[WARRINGTON J. You have to shew that the annuity is a specific devise, and chargeable with estate duty under *In re Jolley*. (1)]

We submit that it has to pay its proportion of the duty if it is primarily charged on the Greenwich estate. That is all we have to shew. The whole question is whether the annuity passed to the "executors as such" within s. 9, sub-s. 1, of the Finance Act, 1894. If so it is a testamentary expense, but not otherwise: *In re Countess of Orford* (2); *In re Sharman* (3); *Berry* v. *Gaukroger* (4); *In re Duke of St. Albans*. (5) This annuity is a rent-charge, and does not pass to the executors as such. By s. 6, sub-s. 2, the executor may pay the estate duty on it; but the annuitant is liable (s. 8, sub-s. 4); a rateable part of the estate duty is a first charge on the annuity (s. 9, sub-s. 1), and is recoverable under s. 14, sub-s. 1. The annuitant herself only has to pay interest on the estate duty: *In re Parker-Jervis* (6); but she is bound to pay that: *Forrest* v. *Prescott*. (7) The fact that the residue is a mixed fund does not prevent the executors from having a charge for the duty. *In re Jolley* (1) did not decide that where there was a mixed fund the estate duty on realty was also a testamentary expense. If executors pay duty on realty it is as trustees, not as executors.

Rowden, K.C., in reply. This cannot be a rent-charge. If so, it would have failed altogether if the testator had parted with the Greenwich property in his lifetime. That cannot have been intended. The general principle is that legacies include annuities. The statement in Theobald on Wills, 5th ed. p. 442, goes too far. The authorities cited in support of it are all cases of construction of particular documents, and do not affirm the proposition. The statement at p. 129, that a gift of an annuity with a mere charge on land is not specific, is correct: *Paget* v. *Huish*. (8) The charge does not alter the character of the annuity, and it comes within the first class of

(1) 17 Times L. R. 244.
(2) [1896] 1 Ch. 257.
(3) [1901] 2 Ch. 280.
(4) [1903] 2 Ch. 116.
(5) [1900] 2 Ch. 873.
(6) [1898] 2 Ch. 643.
(7) (1870) L. R. 10 Eq. 545.
(8) (1863) 1 H. & M. 663.

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legacies mentioned in that case by Page Wood V.-C. The personalty is not exonerated. The respondents must shew that it is in the second class. We do not admit that on the true construction of this will the widow has powers of distress and entry. The annuity is not a specific legacy: *Davies* v. *Ashford.* (1) No question of charging a proportionate part of the duty on the land can arise here, for both the real and personal estate are given as a mixed fund to the same persons: *In re Gray* (2); *In re King.* (3)

WARRINGTON J. In this case a question is raised as to the incidence of estate duty, and the principal question that is so raised is whether any part of the estate duty payable in respect of the testator's estate ought to fall upon an annuity given to his widow. That is the substance of what I have to decide. In support of the case for the residuary legatees who seek to throw a portion of the estate duty on the annuity, it is contended that it is a part of the real estate—that is to say, that it is to be treated as a legal rent-charge payable exclusively or primarily (and in this case it comes to the same thing according to the argument) out of the real estate, and that, it being substantially a part of the real estate, it stands on the same footing as if there had been a specific devise of part of the real estate. It is further argued that the case comes within *In re Jolley* (4), in which Joyce J. decided that the estate duty payable in respect of specifically devised real estate must fall upon that estate. In truth, the question I have to decide is whether upon the true construction of the testator's will the annuity is part of the real estate and ought so to be treated. The material parts of the will to determine this question are contained in paragraphs 5 and 7. [His Lordship read those clauses.] That is the whole of the will which it is necessary to read for the purposes of my judgment. At first sight I think one may say that there seems to be little to be said on the words of the will for the contention that the annuity is really part of the real estate. It is an annuity given in the

(1) (1845) 15 Sim. 42.
(2) [1896] 1 Ch. 620, 627.
(3) [1904] 1 Ch. 363.
(4) 17 Times L. R. 244.

usual and ordinary form for describing a personal annuity. It is true that it is declared to be a charge on specific real estate, but that again looks at first sight like nothing more than a security for payment of the annuity. According to the general rule an annuity is included amongst legacies, and I should have thought that that rule would have extended to this annuity, especially as the estate at Greenwich is not specifically devised, but is included amongst the items devised by clause 7. On the words of the will standing alone, I should have had little difficulty in arriving at the conclusion that the annuity was a mere personal legacy secured by a charge on land. But I was referred to certain authorities, and to a statement of the law contained in a well known text-book, Theobald on Wills. That statement is to be found at p. 442 of the 5th edition. It is this: "a gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable." If that is a correct statement of the law, it is obviously applicable to the will with which I have to deal, and I should be bound to hold that the annuity was a legal rent-charge and nothing less, and Mr. Terrell's argument for the residuary legatees might prevail as to that part of it. What the result would have been is another matter. But is that a correct statement of the law, or does it require some modification? I was referred to all the cases which the learned author cites in support of it except *Lomax* v. *Lomax* (1), which, as both parties agree, does not support the proposition. I have been referred to and have considered all the other cases which are cited, and I may say that the result of that consideration is that they are all cases depending upon the construction of the particular will in each case. The first case is *Shipperdson* v. *Tower*. (2) There the testator, after directing his debts, funeral and testamentary expenses to be paid, bequeathed several annuities and pecuniary legacies, and declared that the several annuities thereinbefore bequeathed should be charged upon his real estate. I may say in passing that it is not in that case a charge on specific real estate, but upon all his real

(1) 12 Beav. 285, 290. (2) 1 Y. & C. Ch. 441; 57 R. R. 421.

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estate. By a subsequent clause he charged all his real estate with the payment of all his debts, funeral and testamentary expenses, and legacies, or of such part thereof as his personal estate not specifically bequeathed should be insufficient to pay and satisfy. It is not mentioned in the head-note, but I may add that the annuities were charged on the real estate, and the will expressly gave powers of distress and entry to the annuitants. It was held that the annuities were primarily if not solely charged upon the testator's real estate, and that under the term "legacies" the testator did not mean to include annuities. If one looks at it that must have been the result, for he charged the annuities on real estate, and gave the annuitants powers of distress and entry; but he charged the legacies on the real estate only in relief of the personalty. It is plain that he meant to make a distinction between annuities and legacies. It is difficult to see how the Court could have come to any other conclusion. *Shipperdson* v. *Tower* (1), therefore, stands entirely alone, and turns on a question of construction.

The next case is *Patching* v. *Barnett*. (2) That is a case which requires rather more consideration. It is a long case, and there are a good many points in it; but the only point which I need refer to is this: The testator devised real estate to trustees upon certain trusts, and by a codicil he gave an annuity to E. S. during her life, and charged the same on two specific real estates with usual powers of distress and entry in case the annuity should be in arrear. In the first place it is to be noticed that that is a gift which comes entirely by itself in a codicil, and deals with nothing else than the annuity. It charges it on specific real estate, and gives express powers of distress and entry. It came before Malins V.-C., and then before the Court of Appeal. The Master of the Rolls dealt with it very much as I have already indicated. He said (3): "Here is a gift by a codicil to a lady of an annuity or yearly sum, which the testator directs to be charged upon two certain farms, and he directs that if it is in arrear or unpaid, it shall be

(1) 1 Y. & C. Ch. 441; 57 R. R. 421. (2) 51 L. J. (Ch.) 74.
(3) 51 L. J. (Ch.) 78.

lawful for her to distrain 'to the end and intent that she may be fully paid and satisfied the annuity.' That is how she is to be paid, and then if it is in arrear for a longer time, it is to be lawful for her 'to enter into and upon and to hold all and singular the hereditaments hereby charged with the payment of the said annuity or yearly sum of 100*l.* and every part thereof, and to receive and take the rents and profits thereof to her and their own use until she and they shall be therewith and thereby or otherwise fully paid and satisfied the said annuity and the arrears thereof due at the time of such entry, and which shall afterwards accrue and become due during her and their being in possession of the hereditaments, together with all costs, charges and expenses,' and so on. It appears to me to be too plain for argument that that is a legal limitation of a rent-charge. The words 'annuity or yearly sum' no doubt may describe both a personal annuity and a rent-charge. When you look to the subsequent limitations and on what it is charged, there is a rent-charge." I suppose that by subsequent limitations the Master of the Rolls must have meant those in the codicil. He cannot be referring to the limitations in the will. "There is no oneration or exoneration of personal estate. The personal estate is not charged at all. As I said before, those cases which say that where there is a bequest payable out of personal estate the mere addition of a charge on real estate does not exonerate the personalty, have no application to a case where, from the construction of the instrument, the Court is led to the conclusion that the personal estate is not liable." The Master of the Rolls thought the case ought to be decided according to the construction of the particular instrument, and that the true intention of the testator expressed in the codicil was that E. S. should have a rent-charge charged on the estate, and not an annuity. It was a case which depended on the construction of the will. He recognised the authority of cases which say that "where there is a bequest payable out of personal estate the mere addition of a charge on real estate does not exonerate the personalty." That case is undoubtedly the one which comes nearest to supporting Mr. Theobald's proposition; but for the reason I

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have given I do not think that it really does support it. It depends on the construction of the particular instrument.

The next case is *Buckley* v. *Buckley* (1), where the head-note is not quite accurate. It is necessary to look at the full statement of the will in the body of the report. The testator gave a great number of annuities or rent-charges. I will take one of them as an example. He says: "I give devise and bequeath unto my wife for and during the term of her natural life one annuity or yearly rent-charge of 150*l.* the same to be a first charge on my property in High Street Belfast and to be payable on the days hereinafter mentioned." He gives another annuity or yearly rent-charge of 150*l.* to his daughter, to be a second charge on his property in High Street, Belfast. This annuity he limits not only to his daughter, but to her children or other issue; and then he gives to his son Michael 100*l.* a year during his life (not calling it an annuity), to be a third charge upon his said property in High Street. There follows another annuity or yearly rent-charge of 65*l.* a year to another son to be a fourth charge, and a similar annuity to a third son to be a fifth charge on the property. Again, on the construction of this will, it seems obvious that what the testator was dealing with was this property, and that he was giving his wife and children charges on it. The decision of the Master of the Rolls was that they were rent-charges and not payable out of the personal estate. In doing so he professes to be following *Lomax* v. *Lomax* (2), *Shipperdson* v. *Tower* (3), and *Patching* v. *Barnett.* (4) Therefore *Buckley* v. *Buckley* (1) also depended upon the construction of the particular will.

The next case cited is *In re Waring.* (5) That was even more a special case. The testator devised and bequeathed all his real and leasehold estate to his son L., and, after giving legacies to his daughters and others, directed that his daughters should reside with L. while they remained unmarried; and in case of any of them not agreeing to do so he directed as follows: "I direct that my son L. shall pay to them the annual sum of

(1) 19 L. R. Ir. 544.
(2) 12 Beav. 285, 290.
(3) 1 Y. & C. Ch. 441; 57 R. R. 421.
(4) 51 L. J. (Ch.) 74.
(5) [1896] 1 I. R. 427.

200*l.*, said sum to be paid to them or any of them so long as they or any of them shall remain unmarried; and I charge all my real and freehold property with said annual sum of 200*l.*; and in case all my said daughters shall marry, then the said annual sum shall cease." He gave the residue of his property real and personal to L., subject to the payment of his debts, funeral and testamentary expenses, and appointed L. his executor. He died possessed of freehold and leasehold property and ordinary personalty, and it was held that the annuity was charged only on the freeholds, and not on the leaseholds or other personalty. What was the meaning of that? The daughters were to live with the devisee of the real estate. If they did not live with him, he was to make them an allowance until they married. What was more natural than to find that the testator had charged that annuity on the real estate which he had given to his son? I may mention this also—that, having given to him real and leasehold property, he charged the 200*l.* on the freeholds only, thus shewing an intention to charge it on that property only, and not on the leaseholds. It is not an annuity at all; it is a charge on the freehold property. That seems to me to be a case which does not support the general proposition, but to depend upon the construction of the will. I come to the conclusion, therefore, that the statement in Theobald on Wills is not, as it stands, an accurate statement of the law. It is only accurate if it is read to be "a gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable if according to the true construction of the instrument in question that is the result." Putting that aside, what is the position when in the absence of anything else to lead to an opposite conclusion a testator gives an annuity and charges it on real estate? For that purpose I will refer to *Paget* v. *Huish*. (1) I will not refer to the head-note, but to part of the judgment of Page Wood V.-C., in which (2) he lays down general principles of law. He says: "The question on this special case is one which very frequently arises, whether certain annuities are given only out of particular property, or whether,

(1) 1 H. & M. 663. (2) 1 H. & M. 667.

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though they be charged primarily on that, the personal estate of the testator is liable to make good any deficiency. There is also a further question, whether the annuities are payable out of corpus or only out of income. As to the first point, the authorities may be ranged under three heads, the distinctions being perfectly clear, though there is often much difficulty in applying them to a particular will. The first class is where you have a simple gift of a legacy or annuity, with a mere charge upon real estate; and there the personal estate is not only not exonerated, but remains primarily liable; just as in the case of a charge of debts. Another class is where the legacy or annuity is a specific gift out of real estate, which is assumed to be sufficient to cover the amount. There the personal estate is in no way liable, and if the specific fund fails, the gift must fail with it. The third class is intermediate to these, where a legacy or annuity is, as it is termed, demonstrative, there being a clear general gift, but a particular fund pointed out as that which is to be primarily liable, on failure of which the general personal estate remains liable." Under which class does this annuity come? I think it comes within the first. It is a simple gift of an annuity with a charge on real estate. There is nothing beyond that. It is contended that there is something in this will which enables me to hold that this is a mere rent-charge, or at least payable primarily out of the real estate. It is said that since the Conveyancing Act, 1881, every such annuitant has the right of distress and entry as a security for his annuity; that I must presume that the testator knew that, and therefore omitted to insert express powers of distress and entry in the gift; and therefore that this case is on all-fours with *Patching* v. *Barnett*. (1) But I have to determine this case as a question of construction. To shew that the testator knew that the annuitant would have powers of distress and entry carries the case no further, because, even if this was a personal annuity, since the Conveyancing Act if it was charged on land the annuitant would have powers of distress and entry. So that it throws no light upon the point, for the Conveyancing Act applies as much to a personal annuity with a charge on real

(1) 51 L. J. (Ch.) 74.

estate as to a rent-charge. The conclusion I have come to is that this is a mere personal annuity not payable primarily out of the Greenwich estate, but payable (I will not say primarily) out of the personalty. This is a mixed fund, and the annuity is payable in the same manner as the other legacies out of the mixed fund, but with a special charge if necessary on the Greenwich property.

In these circumstances I need not deal with the question how far the estate duty on a rent-charge where the land is included with the personalty in a joint gift is covered by a direction to pay testamentary expenses. But I may say that I can see a great deal of difference between a direction to pay testamentary expenses out of personalty and a direction to pay them out of a mixed fund. I think an argument may well be founded on that distinction, but I need not decide anything of the kind now.

I hold that this is simply a legacy payable like the other legacies, and the incidence of the estate duty will follow from that.

Solicitors: *Harston & Bennett; Ward, Perks & McKay.*

H. C. R.

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In re ROSE.
HASLUCK (TRUSTEE IN THE BANKRUPTCY OF E. T. ROSE) *v.* ROSE.

[1904 R. 798.]

Settlement—Limited Power of Appointment—Ultimate Reversion in Donee—Bankruptcy of Donee—Capacity of Trustee to release Power—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 120.

Order of Farwell J., [1904] 2 Ch. 348, discharged by consent.

On the point decided by Farwell J., namely, that the trustee in the bankruptcy of the donee of a limited power of appointment could not release the power for the benefit of the bankrupt's estate, the Court of Appeal expressed no opinion.

APPEAL from the decision of Farwell J. (1), where the facts are stated.

The question was whether the trustee in the bankruptcy of the donee of a limited power of appointment, given to him by a settlement, could release the power for the benefit of the bankrupt's estate. The summons was taken out by the trustee in the bankruptcy, the only defendants being the trustees of the settlement. Farwell J. held that the trustee could not release the power.

The trustee appealed.

Upjohn, K.C., and *E. Ford*, for the trustee.

Jenkins, K.C., and *H. C. Bischoff*, for the trustees of the settlement, said that the trustees had no interest in the question and had no desire to argue the point. They submitted that a decision in the absence of persons who might be interested under an exercise of the power would not bind any one. And it would be premature to argue the point now.

Upjohn, K.C., and *E. Ford*, for the trustee, asked for leave to amend by adding as parties persons who might take under an exercise of the power.

[ROMER L.J. You could only ask for a declaratory order.]

(1) [1904] 2 Ch. 348.

The question is not premature; it is the duty of the trustee to realize the bankrupt's estate as soon as possible. The decision is res judicata against him.

[ROMER L.J. A decision now would not bind a purchaser from the trustee; he could raise the same point again.]

The tenant for life might say he did not wish to exercise the power.

THE COURT (Vaughan Williams, Romer and Cozens-Hardy L.JJ.) said that, in the absence of persons who might be interested under an exercise of the power, the proceedings on the summons would be ineffective, even if the Court should decide in favour of the appellant. The best course would be to discharge the order of Farwell J. by consent, the appellant paying the respondents' costs of the appeal as between solicitor and client. The appellant could then take such other proceedings as he might be advised.

[The parties acceded to this suggestion.]

Solicitors: *Hilbery & Son; Bompas, Bischoff & Co.*

W. L. C.

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In re WHITING'S SETTLEMENT. WHITING *v.* DE RUTZEN.

[1903 W. 2068.]

Settlement — Condition — Validity — Restraint of Marriage — Forfeiture on Marriage at any Time without Consent of Named Persons — Condition subsequent — Gift over — Practice — Parties — Representation of Unborn Children — Trustees — Rules of Supreme Court, 1883, *Order* XVI., *r.* 32 (*a*).

A condition subsequent in partial restraint of marriage, e.g., a condition providing for the forfeiture of interests, given by a settlement to a daughter of the settlor and her children, upon the marriage of the daughter at any time without the consent of named persons, is valid and enforceable if it be accompanied by a gift over of the fund on marriage without the required consent.

Decision of Warrington J. affirmed.

The validity of such a condition was settled in *Dashwood* v. *Lord Bulkeley*, (1804) 10 Ves. 230, and *Lloyd* v. *Branton*, (1817) 3 Mer. 108; 17 R. R. 33, and earlier cases, and those decisions cannot now be questioned.

Per Byrne J.: The Court has no power to appoint a person to represent a class of which there is no member in existence, e.g., unborn children.

Upon a summons to determine the construction and effect of a settlement, unborn children who take an interest under the trusts are sufficiently represented by the trustees.

ADJOURNED SUMMONS, raising the question whether a condition in restraint of marriage was valid.

By a voluntary settlement dated January 22, 1886, Henry Whiting declared that securities of the value of about 30,000*l.*, which he had transferred to the trustees thereof, should be held by them upon trust to pay the income thereof to himself for his life, and then upon trust (subject to the proviso as to marriage thereinafter contained) to pay the income to his daughter Juliette Whiting for her life after she should have attained the age of twenty-six years, or been married under that age with such consent as thereinafter was required, for her sole and separate use without power of anticipation, and after her death to hold the funds in trust for her issue, if any, as she should appoint, and in default of appointment for her children. If she had no children, 5000*l.* was to be paid out of the trust funds

to the magistrates or magistrate for the time being of the police court at Bow Street, to be invested by them, with power to them to distribute the income in the same manner as that of the Police Relief Fund which had been established by the settlor was distributed. The residue of the trust fund was to be held in trust for the settlor's sons, Henry Paul Whiting and Matthew Noel Whiting, in equal shares.

By clause 9 it was provided that if the daughter should marry under the age of twenty-six years without the consent of the settlor during his life, and after his death of his wife during her widowhood, and after her second marriage or death without the consent of the trustees, or if the daughter should either before or after the age of twenty-six marry a person other than a person born of English, Welsh, or Scotch or of Greek parents, then or in either of these events the trusts declared of the trust fund and the income thereof after the death of the settlor should, subject as next thereinafter mentioned, cease and determine as from the date of such marriage.

Clause 10 was as follows: "And then, subject to the life interest of the said Henry Whiting in the said trust fund, and to any interest therein or in the income thereof that may then by virtue of these presents have been acquired by any previous issue of the said Juliette Whiting, the trustees shall stand possessed of the sum of 5000*l.* sterling to be raised out of such portion of the trust fund as shall consist of pure personal estate in trust to pay the same to the said magistrates or magistrate" upon the trusts mentioned above. "And" (clause 11) "shall stand possessed of the residue of the trust fund and the income thereof in trust" for the settlor's said two sons in equal shares.

By clause 12 the daughter was, until she should attain twenty-six or should marry with such consent such a person as before mentioned, to receive out of the income after the death of the settlor 100*l.* a year for pocket-money.

The deed contained a proviso that it should be lawful for the settlor at any time or times by deed or will wholly or partially to revoke or to alter or vary the settlement.

By a deed-poll dated March 29, 1887, the settlor made some

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alterations in the settlement, the only one which it is material to mention being the striking out of the words "or of Greek" from clauses 9 and 12. In other respects the settlor confirmed the settlement. A similar power of revocation and alteration was reserved, applying to both the deed-poll and the original settlement.

By another deed-poll, dated May 22, 1891, the settlor altered the original settlement by revoking clause 9 and substituting the following clause for it: "That if the said Juliette Whiting shall marry without the consent in writing of the said Henry Whiting during his life, or shall after his death and during the lives of Juliette Antoinette Whiting (the wife of the said Henry Whiting) and the said Henry Paul Whiting and Matthew Noel Whiting marry without the united consent of all three while living, or without the joint consent of the two survivors, or without the consent of the last survivor of them marry without their or her or his consent in writing [*sic*], then and in either of these cases the trusts of the principal indenture declared of the trust fund and the income thereof after the death of the said Henry Whiting shall, subject as next hereinafter (meaning thereby clause 10 of the principal indenture) mentioned, cease and determine as from the date of such marriage." By this deed-poll the following declaration was introduced into the original settlement: "That the consents or consent by the principal indenture as varied by these presents required to the marriage of the said Juliette Whiting shall apply to every marriage contracted by her during the life of the said Henry Whiting, and after his death during the lives of the said Juliette Antoinette Whiting, Henry Paul Whiting, and Matthew Noel Whiting, and the lives of the survivors and the life of the survivor of them. And, in so far as the principal indenture and the said deed-poll are not revoked, altered, or varied by these presents, the said Henry Whiting doth hereby confirm the same."

By this deed-poll power to revoke or vary was again reserved.

By a deed-poll dated December 29, 1893, the trust of the residue for the settlor's two sons was revoked, and there was substituted for it a gift of the residue to the magistrates at Bow

Street upon the same trusts as had been declared of the 5000*l.* given to them by the settlement.

In August, 1892, the settlor made a will by which he made no provision for his daughter, but he confirmed the settlement of 1886 as varied by the deeds-poll and subject to his power of thereafter revoking the same. He died on December 8, 1894, without having again exercised his power of revocation.

On September 18, 1897, Matthew Noel Whiting died.

In March, 1902, the daughter, who was then more than twenty-six years of age, became engaged to be married to General Sir Alfred Turner, K.C.B. Her mother approved of and consented to the marriage, but the brother, Henry Paul Whiting, refused to give his consent.

The mother died on June 16, 1902, and on August 23, 1902, the daughter, being then of the age of thirty-four, was married to Sir A. Turner without the consent of her brother, Henry Paul Whiting.

The trustees of the settlement and deeds-poll took out a summons to determine the question whether the condition as to the daughter's marriage was valid, and whether by her marriage without her brother's consent her interest and that of any issue which she might have had been forfeited, and whether the trust funds ought to be transferred to the magistrates of the Bow Street Police Court.

There was evidence that there were two funds respectively called the Police Relief Fund and the Bow Street Reward Fund, which were respectively administered by the commissioners of police and the Bow Street magistrates, both of these funds having been founded by Henry Whiting. Both the commissioners and the magistrates had been asked what would be done with the settlement trust fund in case the Court should decide that the interests of Lady Turner and her possible children had been forfeited. The magistrates replied that "the fund was much too large for them to dispose of in the ordinary manner in which the Reward Fund was disposed of." The commissioners replied that "the fund was much too large to be used properly for the Police Relief Fund purposes."

There were as yet no issue of the daughter's marriage.

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In the first instance the summons was heard by Byrne J. on February 25, 1904. In the course of the argument

Sir E. Clarke, K.C., and *Manby*, for Lady Turner, stated that Sir Alfred and Lady Turner would not have made any personal claim, but they had to consider the interests of any children they might have.

[BYRNE J. The question must be argued in their interest, and they must be represented in some way. Can I not under the rules appoint some one to represent a possible class?]

Mulligan, K.C., and *Vaughan Hawkins*, for the trustees of the settlement. It may be said that the ordinary rule that trustees represent unborn children does not apply in this case, where the mother is a party and in the same interest; but the trustees are willing and desirous to discharge their duty.

Rowden, K.C., and *R. A. Bullock Marsham*, for the magistrates. The rule on the subject is Order XVI., r. 32 (*a*), and we submit that it applies to unborn persons.

[BYRNE J. The difficulty is that there is nobody in existence who is a member of the class.]

In *Lady Cardigan* v. *Curzon Howe* (1) it was held that unborn children were sufficiently represented by the trustees of the will. According to the law of the Court, not depending on any statutes, the unborn children, being an unascertained class and a class that cannot be represented by an individual member of it at the time, are represented by the trustees: *Fussell* v. *Dowding*. (2) Order XVI., r. 46, does not apply to the representation of the possible estate of unborn children under legal limitations: *Miles* v. *Jarvis*. (3)

Sir E. Clarke, K.C. It is doubtful whether in this case the trustees could properly represent the unborn children, for the first trustee is the person who has refused his consent.

BYRNE J. This is not an unimportant point. [His Lordship read the report of *Miles* v. *Jarvis* (3), and continued:—] Kay J. in that case obviously adopted the view that he could

(1) [1901] 2 Ch. 479, 485. (2) (1884) 27 Ch. D. 237, 240.
(3) [1883] W. N. 203.

not appoint a person to represent a class of persons entitled under legal limitations. The difficulty does not arise if there are trustees of the settlement who by virtue of their office represent cestuis que trustent otherwise unrepresented whether in existence or not. I think that is the solution. The right thing will be for me to hear counsel on behalf of Lady Turner, and then to call upon counsel for the trustees to say anything they may desire on behalf of unborn children.

No appointment of any person to represent the unborn children was therefore made.

The case was argued at length, and judgment was reserved; but, owing to the lamented death of the learned judge before delivering judgment, the summons was heard again by Warrington J.

Mulligan, K.C., and *Vaughan Hawkins*, for the trustees.

Rowden, K.C., and *R. A. Bullock Marsham*, for the magistrates. Lady Turner's interest has been forfeited, and the gift over has taken effect. We admit that the condition of marriage with consent is a condition subsequent, and that the restriction would be void if there were no gift over: Theobald on Wills, 5th ed. p. 544; *Scott* v. *Tyler* (1); *Lloyd* v. *Branton* (2); *Dashwood* v. *Lord Bulkeley*. (3)

This is only a partial restraint on marriage and is valid. By the old law anything which tended to restrict marriage was bad altogether. But in England partial restraints on marriage soon came to be allowed—for instance, marriage before a certain age without consent. A restraint might be valid and yet be ineffectual. It might be in terrorem only. A condition subsequent without a gift over is in terrorem only; but a gift over makes it good, because it shews that the settlor has treated it as effectual: Theobald on Wills, 5th ed. p. 545. General restraints on marriage are not necessarily void: *Dashwood* v. *Lord Bulkeley*. (3) That is not a direct decision on the point, but the result is implied. That was followed in *Lloyd* v.

(1) (1788) 1 W. & T. 7th ed. p. 535.
(2) 3 Mer. 108; 17 R. R. 33.
(3) 10 Ves. 230.

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Branton (1), which lays down that a condition subsequent, causing the forfeiture of a previous gift in the event of a marriage at any time without the consent of a specified person, is a good condition if there is a gift over, and that it also destroys the interests of the children. That case has never been dissented from; it is referred to in Jarman on Wills, 5th ed. vol. ii. p. 887, and is cited with approval in *In re Nourse.* (2)

[They were stopped by the Court.]

Sir E. Clarke, K.C., and *Manby*, for Lady Turner. The origin of the rule against restrictions on marriage was the tendency of the canon law in the interests of morality to favour marriage. It was not considered right that any woman should be placed in such a position that she could not marry without the consent of somebody else: Godolphin's Orphan's Legacy, 4th ed. Part I. cap. 15. The principle has been cut down from time to time for various reasons: *Stackpole* v. *Beaumont* (3); but there is no authority for saying that a woman can be prevented at the will of one person from marrying during her whole life. An exception has been introduced in the case of widows and widowers: *Allen* v. *Jackson* (4); and restrictions up to the age of twenty-four have been allowed, but no further: *Knapp* v. *Noyes* (5); *Crommelin* v. *Crommelin.* (6) *Lloyd* v. *Branton* (1) is wrong. It treats the point as if it had been already decided; but the only reason for that view was the decision in *Dashwood* v. *Lord Bulkeley* (7), in which the point was not even argued. The real ground of the decision in that case was the fact that the lady was married the day after she attained twenty-one. *Lloyd* v. *Branton* (1) has never been followed, and it is not cited in some of the text-books.

Secondly, the settlement and the deeds-poll must be read together, and it is then clear that the settlor did not mean the restriction to apply after his daughter attained twenty-six, and he did not intend the interests of her children to be absolutely forfeited on her marriage without consent. The Court will construe the restriction as applicable only to marriage under

(1) 3 Mer. 108; 17 R. R. 33.
(2) [1899] 1 Ch. 63, 70.
(3) (1796) 3 Ves. 89–95; 3 R. R. 52.
(4) (1875) 1 Ch. D. 399.
(5) (1768) Amb. 662.
(6) (1796) 3 Ves. 227.
(7) 10 Ves. 230.

twenty-six: *Lloyd* v. *Branton* (1); *Scott* v. *Tyler* (2); *Desbody* v. *Boyville* (3); *Duggan* v. *Kelly*. (4)

R. J. Parker and *Tomlin*, for the Attorney-General.

Mulligan, K.C., and *Vaughan Hawkins*, for the trustees, and as representing unborn children of Lady Turner. We adopt the arguments which have been advanced on behalf of Lady Turner. Even if her interest is forfeited, there is no authority for saying that the interests of her children are thereby affected.

WARRINGTON J. It is unnecessary for me to say what I should be prepared to do, if I did not feel myself bound by authority; but in this case I consider myself bound by the decision in *Lloyd* v. *Branton* (5) to decide that the interest taken by Lady Turner and by her possible issue has been forfeited in favour of the Police Relief Fund. [His Lordship stated the facts, and continued:—]

Now it is admitted on the part of the magistrates at Bow Street that the effect of these provisions is this—that there is a trust in favour of Lady Turner of the income, from the time she attains the age of twenty-six, for her life for her separate use without power of anticipation, with a gift over at her death in favour of her issue, and that the provision as to the interest ceasing in the event of her marrying without the specified consent is a condition subsequent. It is further admitted that that condition subsequent would be merely in terrorem, but for the fact that there is a trust over which gives the fund in the event of marriage without consent to the magistrates at Bow Street.

It is contended on the part of Lady Turner that that condition subsequent is not merely inoperative and in terrorem only, but that it is void altogether as infringing the rule of the canon law, which has to some extent been incorporated into the law of England, that any condition in restraint of marriage is a void condition.

(1) 3 Mer. 108, 116; 17 R. R. 33.
(2) 1 W. & T. 7th ed. p. 535.
(3) (1729) 2 P. Wms. 547.
(4) (1848) 10 Ir. Eq. Rep. 473.
(5) 3 Mer. 108; 17 R. R. 33.

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It has of course, as we all know, been frequently decided that conditions in restraint of marriage, limited as to time, as to place, and as to a person, have been held to be good conditions, notwithstanding the rules of the civil law. But it has been contended on behalf of Lady Turner that this condition, if, upon its true construction, it extends to any marriage made by her at any time during her life, is not within the exceptions which have been so engrafted on the rule of the canon law.

If the case were without authority, that would be a very interesting question to discuss; but, as I have already said, I consider that I am bound by authority. The only decision really in point is that which has been so much discussed to-day: *Lloyd* v. *Branton*. (1)

The facts in that case are sufficiently stated in the head-note: "Testator gives 24,000*l*., upon trust, as to 6000*l*. to pay the interest to S. B. (his niece) during her life, and, after her decease, the principal among her children; if she should die without issue, over. He declares similar trusts as to three other sums of 6000*l*. (making the remainder of the 24,000*l*.) for his three other nieces and their children. Proviso, that, in case any of his said nieces should marry without such consent as therein prescribed, each, &c., so marrying, should forfeit the interest of her 6000*l*., and all other sums to which she may be entitled under his will; and the respective sums of 6000*l*., and all such other sums, &c. should fall into his residue." Then he gave the residue in trust for certain nephews and their children.

It will be observed that in that case there was a trust, as there is here, for the lady in question and her children, and further that the terms of the proviso imposing the condition as to marriage did on the face of them extend to a marriage at any time without the prescribed consent. The case seems to have been somewhat elaborately argued on behalf of the lady and her husband, and on two grounds. First, that there was no sufficient bequest over—with that ground of course we have nothing to do here; and, secondly, that the condition could not be held to extend to a marriage without

(1) 3 Mer. 108; 17 R. R. 33.

consent if the lady had attained the age of twenty-one. I do not think the reporter, in summarizing the grounds upon which the contention is based, has quite correctly stated them, because I think he ought to have stated a third head, namely, that the condition, if held to extend to a marriage without consent after the lady had attained twenty-one, would be a bad condition. He has not stated it in summarizing the argument, but, when you look at the argument under what the reporter calls the second head, it will be found that the learned counsel who argued the case divided it into two parts. First, with regard to construction, they argued that the condition ought to be limited to twenty-one; and, secondly —an argument founded on the general proposition of law independently of construction—that if not so limited the condition ought to be held to be bad. In the course of the argument they cited *Stackpole* v. *Beaumont* (1), and in particular one passage in the judgment (2), which as far as it goes was undoubtedly in favour of the arguments which counsel were then presenting to the Court, because it states as a ground for holding that a condition requiring consent to a marriage after twenty-one is good the fact that the law itself imposes restraints on marriage under that age without consent.

So far undoubtedly that case was an authority for the proposition for which counsel were contending, and I only refer to it to shew that they did place before the learned Master of the Rolls, Sir William Grant, all the materials, as far as one can see, which were available at the time in support of their argument. Notwithstanding that, the Master of the Rolls in giving his judgment said (3): "It is now too late to raise a doubt on the legality of the condition on which Mrs. Barnard's right to the bequests given her by the will is made to cease. In the modern case of *Dashwood* v. *Lord Bulkeley* (4), the validity of such a condition does not seem to have been considered as at all open to controversy, although it was not confined to marriage under twenty-one." He then proceeded to discuss the other questions which had been

(1) 3 Ves. 89; 3 R. R. 52.
(2) 3 Ves. 97.
(3) 3 Mer. 116.
(4) 10 Ves. 230.

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argued—first, as to construction, namely, whether it could be limited to marriage without consent under the age of twenty-one years; and, secondly, whether there was a sufficient gift over.

Now it is quite true that when *Dashwood* v. *Lord Bulkeley* (1) is looked at, it is not a decision in favour of the point then before the Master of the Rolls; but it is also quite true that in that case a very elaborate discussion was entered into on the facts as to whether consent had or had not been given, which would have been wholly irrelevant if the consent required was limited to marriage under the age of twenty-one years. It is quite true, as Sir Edward Clarke has pointed out, that the marriage in that case was arranged before the lady had attained twenty-one, and was solemnized immediately after she had attained twenty-one; but I do not think that accounts for the almost inexplicable fact that, if the counsel and the judge before whom that case came thought that consent if not limited to twenty-one would be merely a condition in terrorem, that point was not argued.

It comes to this, that *Lloyd* v. *Branton* (2) is a distinct authority for the proposition that a condition subsequent, causing a forfeiture of the previous gift in the event of the marriage of the donee at any time without the consent of a specified person, is a good condition, provided there is a gift over. That case seems to me to be exactly in point, not only on the general proposition, but also on the smaller question, whether the condition as to forfeiture and the gift over destroyed the interest of the children as well as that of Lady Turner, and I think I must decide that it did.

There is another point which has been taken by Sir Edward Clarke, and rather more elaborately by Mr. Manby. It is said that there is sufficient in the documents to enable the Court to limit the condition by construction to a marriage under the age of twenty-six without consent. I confess to having been very anxious to find, if I could, some way to avoid giving effect to this condition, and I would have been glad to do so if upon the true construction of these deeds

(1) 10 Ves. 230. (2) 3 Mer. 108; 17 R. R. 33.

I could satisfy myself that the settlor intended so to limit the condition. But I think I am bound to read the original deed, together with the deeds-poll which were afterwards executed altering it, as if they were one deed. I mean this. I think I am bound to read the original deed, not as a separate document by itself, but to take the original deed, delete from it the clauses which the settlor has revoked, and substitute for them the clauses which he has substituted by the deeds-poll. The materiality is this—that, if I read the deed in that way, I must cut out altogether the original clause 9, and I must substitute for it the clause 9 which appears in the second deed-poll. I make those remarks with reference to the argument of Mr. Manby, which I confess struck me at first as having considerable weight. His argument was this —that the object of clause 9 of the second deed-poll, and all that it really did, was to alter the persons who were to give consent. Now I do not think that, treating the original settlement and the deeds-poll as in my opinion I am bound to treat them, that is the true view. I think the true view is, as I have said already, that you must cut out clause 9 from the settlement altogether. That is what the testator has told you to do. He does not say, "I propose to alter clause 9 by inserting different persons to give consent from those originally mentioned in the clause," but he says, "I tell you I am putting in a new clause," which he puts in in inverted commas in the deed-poll, and which is obviously so intended because there are these peculiar words at the end, which rather puzzle one until one grasps what the settlor really means, namely, the words, "shall subject as next hereinafter (meaning thereby clause 10 of the principal indenture) mentioned." You are obviously to read this new clause as inserted in the settlement, otherwise the words "next hereinafter" have no meaning at all.

Reading it in that way, I do not think you can possibly construe it as merely intended to alter the persons who are to give consent, and treating it as inserted, as the settlor says it is to be inserted, in the settlement in place of the original ninth clause, then I think it is impossible to come to any other

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conclusion than that the terms of it are general—that there is nothing whatever limiting it to a marriage before the age of twenty-six. Not only that, but there is the subsequent clause, in which the testator is careful to provide, and does by way of a new clause not in the original settlement carefully provide, that the condition is to apply to every marriage contracted by his daughter.

On the whole, then, I will not say with reluctance, because I am bound by the decision in *Lloyd* v. *Branton* (1), but still with a certain amount of regret, I must come to the conclusion that the interests both of Lady Turner and of her possible issue have been forfeited, and that the magistrates at Bow Street are entitled to have the fund according to the terms of the settlement transferred to them.

H. C. R.

C. A. Lady Turner appealed. The appeal came on for hearing on Nov. 28, 1904.

Sir E. Clarke, K.C., and *Manby*, for Lady Turner. The gift over is too indefinite to take effect under this condition, and the cy-près doctrine cannot be imported. To give effect to this forfeiture clause would be to carry the law as to conditions in restraint of marriage further than it has ever been carried before. The condition extends to every marriage contracted by this lady after the age of twenty-six, when, through the death of her father, she became entitled to the income of the fund; it is really a general condition in restraint of marriage, and such a condition has always been held bad. It is submitted that this condition, by which an estate given by the settlor to his daughter is forfeited on her marriage at any age without, in the events which have happened, the consent of her surviving brother, is void. The estate became vested in her in 1894, upon the death of her father.

[ROMER L.J. What estate became vested?]

The only provision which the father made for his daughter is this settlement. Upon his death she became absolutely

(1) 3 Mer. 108; 17 R. R. 33.

entitled to the income of the fund for her life. To say that, in the event of her marriage without consent, this provision is to be taken away from her is a very strong proposition. Primâ facie every condition in restraint of marriage is unlawful: Godolphin's Orphan's Legacy, 4th ed. Part I. cap. 15. The leading case on the subject is *Scott* v. *Tyler* (1); White and Tudor's Leading Cases, 7th ed. vol. i. p. 535; Id. 4th ed. vol. ii. p. 144, where the arguments are reported at length. The condition in the present case is, as was admitted in the Court below, a condition subsequent, depriving the daughter, upon her marriage, of the provision she had been previously enjoying. In nearly all the cases which have come before the Court there has been a limit of age in the condition. The first limitation was the age of twenty-one, for the reasons stated in *Scott* v. *Tyler*. (2) It was there held that a condition limited to twenty-one was a legitimate condition. The rule as to a condition of forfeiture on marriage has been held to apply to a man as well as to a woman: *Allen* v. *Jackson*. (3) The exceptions to the old rule against conditions in restraint of marriage are illustrated in *Stackpole* v. *Beaumont* (4); *Garret* v. *Pritty* (5); *Stratton* v. *Grymes* (6); *Underwood* v. *Morris* (7); *Morley* v. *Rennoldson* (8); *Chauncy* v. *Graydon*. (9) Warrington J. held that he was bound by the decision of Sir W. Grant M.R. in *Lloyd* v. *Branton*. (10) But the foundation of that decision was that, having regard to *Dashwood* v. *Lord Bulkeley* (11), it was too late to discuss the question. That was a very summary way of dealing with the important arguments in *Lloyd* v. *Branton*. (10) Although in *Lloyd* v. *Branton* (10) the authority of *Dashwood* v. *Lord Bulkeley* (11) was taken for granted, yet the report shews that the point was not there really argued.

[COZENS-HARDY L.J. It is remarkable that in *Lloyd* v.

(1) (1788) 2 Dick. 712; 2 Bro. C. C. 431.
(2) 2 W. & T. 4th ed. pp. 203, 205.
(3) 1 Ch. D. 399.
(4) 3 Ves. 89; 3 R. R. 52.
(5) (1693) 2 Vern. 293.
(6) (1698) 2 Vern. 357.
(7) (1741) 2 Atk. 184.
(8) (1843) 2 Hare, 570; 62 R. R. 236.
(9) (1743) 2 Atk. 616.
(10) 3 Mer. 108; 17 R. R. 33.
(11) 10 Ves. 230.

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Branton (1) there was no argument at all, except that on the part of the defendants against the forfeiture.]

The Court will always put a favourable construction upon such a condition so as to prevent forfeiture: *Daley* v. *Desbouverie* (2), a case which shews how anxious the Court is to get rid of such a condition.

[COZENS-HARDY L.J. That case is really an authority against you; for Lord Hardwicke, though astute to find a way out of the condition, did not say that the condition was void, but held that the consent required by it had, in fact, been given.]

In that case it was necessary that particular care should be taken of a child, so that different principles were applied.

[ROMER L.J. *Lloyd* v. *Branton* (1) was decided so long ago as in 1817. It seems to me too old a decision to be disturbed. On general principle, suppose a father had a daughter of somewhat weak mind: would it be unreasonable, in making a provision for her benefit, to impose a condition that the consent of certain relatives should be obtained to her marriage, so as to protect her against any designing person?]

But that is not this case.

[ROMER L.J. Is there any case in which, there being a gift over on marriage without consent, it has been held that the condition did not take effect?]

There is apparently no such case when the age limit in the condition is beyond twenty-one except *Crommelin* v. *Crommelin.* (3)

[COZENS-HARDY L.J. There Lord Loughborough L.C. held that a condition against marriage without consent up to the age of twenty-eight was good.

VAUGHAN WILLIAMS L.J. The question there seems to have been merely one of construction.]

Lloyd v. *Branton* (1) was referred to in *In re Nourse.* (4) But the decision in the latter case rested really on the fact that an alternative provision was made for the legatee, which is not the case here. In the present case the effect of holding

(1) 3 Mer. 108; 17 R. R. 33.
(2) (1738) 2 Atk. 261, 264.
(3) 3 Ves. 227.
(4) [1899] 1 Ch. 63.

the condition to be good would be to deprive the daughter of the only provision made for her by her father, she having an interest in his personal estate only.

[VAUGHAN WILLIAMS L.J. referred to *Marples* v. *Bainbridge* (1), in which it was held that, when there is a gift of property upon a condition subsequent, and no gift over on breach of the condition, the condition is to be considered only in terrorem.

Rowden, K.C., for the police magistrates, referred to *Stevenson* v. *Abington* (2), in which there was a gift over in the event of the legatee disputing the testator's will.]

In *Bellairs* v. *Bellairs* (3) it was held that a condition subsequent in general restraint of marriage was void if annexed to gift of the income arising from a mixed fund consisting of the proceeds of the sale of real estate and pure personal estate. Jessel M.R. there recognised the rule that such a condition would be void in the case of pure personal estate.

[COZENS-HARDY L.J. Has the rule ever been applied to settlements by deed? In all the reported cases the settlement seems to have been made by will.]

It is submitted that on the ground of public policy every condition which tends to discourage marriage is void, though no doubt some limitations have been placed on this proposition.

[COZENS-HARDY L.J. In *Scott* v. *Tyler* (4) Lord Thurlow L.C. said: "An injunction to ask the consent, as I have said before, is a lawful condition, as not restraining marriage generally."]

The Courts have often in such cases been astute in finding or in assuming that the required consent has been given. And it is submitted that the Court will endeavour so to construe the words as to limit the operation of the condition to what may reasonably be supposed to have been in the contemplation of the settlor. In order that the condition may be valid it must be reasonable. Here the condition is unreasonable. The refusal of consent by one person would destroy the interest of

(1) (1816) 1 Madd. 590; 16 R. R. 271.
(2) (1863) 11 W. R. 935.
(3) (1874) L. R. 18 Eq. 510, 513.
(4) 1 W. & T. 7th ed. pp. 535, 550.

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the daughter and that of the children. And, as the settlement originally stood, some of the persons whose consent was required took an interest in the fund in the event of forfeiture. In *Scott* v. *Tyler* (1) Lord Thurlow said: "If instead of creating a condition absolutely enjoining celibacy or widowhood, the same be referred to the advice or discretion of another, particularly an interested person, it is deemed a fraud on the law, and treated accordingly; that is, the condition so imposed is holden for void."

It is submitted that on the fair construction of the documents in the present case the condition is imposed only in the case of the daughter's marriage under the age of twenty-six. She did not marry until after she had attained that age, and therefore, even if the condition is valid, no forfeiture has occurred: *Knapp* v. *Noyes*. (2) In that case such a condition though in terms general was held to operate only until the daughters attained twenty-one; and so it was in *Desbody* v. *Boyville* (3); *Duggan* v. *Kelly* (4), in which case the condition was that none of the testator's children should "at any time hereafter intermarry with a Papist."

Lloyd v. *Branton* (5) is distinguishable from the present case. There the age of twenty-one was not mentioned in the will in reference to the daughter. But she was above twenty-one at the time when the will was made. In the present case the age of twenty-six is clearly pointed out as that at which the daughter was to be treated as coming of age. That shews the intention of the settlor, even if, as Warrington J. said, the deed of 1891 is to be treated as read into the original settlement. It is contended that by the deed-poll of 1891 the settlor only intended to alter the persons whose consent to the daughter's marriage was to be required. The daughter was to take absolutely at twenty-six, subject to clause 9, and that clause ought not to be construed in such a way as to alter the age at which she was to acquire an absolute interest. Clause 14 might be construed as applying to a second marriage under

(1) 2 Dick. 712, 720.
(2) Amb. 662.
(3) 2 P. Wms. 547.
(4) 10 Ir. Eq. Rep. 473.
(5) 3 Mer. 108; 17 R. R. 33.

twenty-six. In that clause the words "at any time during the life of the daughter" are not inserted, though they are used in the clause which forbids a marriage with a foreigner.

If the condition is to extend to the whole of the daughter's life, the result might be to forfeit the whole of the interest of her children even if she married a second time with consent.

[ROMER L.J. I am not sure that the children would be cut out.]

At any rate, the condition is void if it is only in terrorem, there being no gift over. There must be an effectual gift over, and it is submitted that there is no effectual gift over, the fund not being required for the purpose mentioned by the settlor. The Court will not direct the settling of a scheme which would give the fund to an institution not mentioned in the settlement, and thus assist in doing that which would be most inequitable. At any rate, the daughter should have the 20,000*l.*, which is, as the evidence shews, not needed for the purpose mentioned by the settlor.

Mulligan, *K.C.*, and *Vaughan Hawkins*, for the trustees of the settlement and as representing possible unborn issue of Lady Turner. The position of the issue differs in some respects from that of Lady Turner herself. *Lloyd* v. *Branton* (1) is apparently the first case in which it was held that the forfeiture of a mother's interest by reason of her breach of such a condition involved the forfeiture also of the interest in remainder given to her children. That was a great extension of the doctrine. It does not appear from the report of *Lloyd* v. *Branton* (1) that the children were represented before the Court.

[THE COURT sent for the registrar's book, but it did not shew clearly whether the children were separately represented at the hearing of *Lloyd* v. *Branton*. (1)]

In his judgment Sir W. Grant M.R. dealt only with the rights of Mrs. Barnard, the mother.

In *Cooke* v. *Turner* (2) *Lloyd* v. *Branton* (1) was cited. In *Cooke* v. *Turner* (2) the question was whether a condition, in a will of real estate, that a devise should be revoked if the devisee

(1) 3 Mer. 108; 17 R. R. 33.
(2) (1846) 15 M. & W. 727, 733; 71 R. R. 808.

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should dispute the will or the testator's competency to make it, was valid. The Court held that it was. But in delivering the judgment of the Court of Exchequer, Rolfe B. said (1): "The State, from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by a condition in a will, to make the continuance of an estate depend on the owner not doing that which it is or may be in the interest of the State that he should do." Conveyancers seem to have been rather shy of inserting unlimited conditions of forfeiture. There is a precedent in Key and Elphinstone's Conveyancing, 8th ed. vol. ii. p. 877.

In Elphinstone's Introduction to Conveyancing, 5th ed. p. 452, the rules as to the validity of conditions in restraint of marriage are stated.

Rowden, K.C., and *R. A. Bullock Marsham*, for the magistrates. It is submitted that the restraint of marriage being only partial, and there being a gift over, the condition is valid: Theobald on Wills, 5th ed. pp. 544, 545. The proposition that all conditions in restraint of marriage are repugnant to the law of England requires a good deal of qualification. There is no general leaning of the common law against restraint of marriage.

[VAUGHAN WILLIAMS L.J. referred to *Jones* v. *Jones* (2) and to the judgment of Blackburn J. at p. 282.]

In that case the restraint was general and it applied to a devise of realty, and it was held to be valid. The tendency of the Courts has been to limit the application of the rule of the civil law.

Daley v. *Desbouverie* (3) is another authority in favour of the validity of a condition in partial restraint of marriage, and it was referred to by Lord Eldon in *Dashwood* v. *Lord Bulkeley*. (4)

[COZENS-HARDY L.J. referred to *Grant* v. *Dyer*. (5)]

Lloyd v. *Branton* (6) is referred to in Jarman on Wills and Williams on Executors, and the correctness of the decision has

(1) 15 M. & W. 736.
(2) (1876) 1 Q. B. D. 279.
(3) 2 Atk. 261.
(4) 10 Ves. 241.
(5) (1813) 2 Dow, 73; 14 R. R. 118.
(6) 3 Mer. 108; 17 R. R. 33.

never been doubted. It exactly applies to the present case. It is submitted that the Court will not now overrule these decisions, which have stood unimpeached for so many years.

The distinction between a condition in terrorem merely and one which is followed by a gift over is shewn by *Stratton* v. *Grymes* (1), *Aston* v. *Aston* (2), and *Cleaver* v. *Spurling*. (3)

No case has been cited for the appellant in which it has been held that a condition in partial restraint of marriage is bad, if it is followed by a gift over. It is submitted that Warrington J. has rightly construed the deeds.

R. J. Parker, for the Attorney-General.

Sir E. Clarke, K.C., in reply. *Aston* v. *Aston* (2) was considered by Lord Hardwicke in *Reynish* v. *Martin*. (4) On the question of construction the observations of Sir W. Grant in *Lloyd* v. *Branton* (5) are in point; and so are the observations of Richards B. in *Duggan* v. *Kelly*. (6) In *Daley* v. *Desbouverie* (7) it was held that the required consent had been given.

It is submitted that the fact that there is a gift over cannot make every condition in partial restraint of marriage valid. Suppose the condition were that the interest of a daughter should be forfeited in case she should marry under the age of fifty, or in case she should marry a man under the age of seventy, or any man who was not an officer in the Guards. Such conditions would be utterly unreasonable.

VAUGHAN WILLIAMS L.J. This branch of the law is one with which it is not very satisfactory to deal, and I cannot say that I think the mode in which it has been dealt with is very easy to weld into one consistent whole. We are told that the law on this point has been partially imported into our system of law from the Roman law, and that this was done through the Ecclesiastical Courts. And then we are told that the Court of Chancery did not entirely adopt the view of the law adopted by the Ecclesiastical Courts, just as the Ecclesiastical Courts

(1) 2 Vern. 357.
(2) (1703) 2 Vern. 452.
(3) (1729) 2 P. Wms. 526, 528.
(4) (1746) 3 Atk. 330, 335.
(5) 3 Mer. 108; 17 R. R. 33.
(6) 10 Ir. Eq. Rep. 477.
(7) 2 Atk. 261.

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did not adopt in its entirety the Roman law. And eventually, as a matter of history, we find ourselves face to face with this state of things—that the Court of Chancery had to administer rules of law which they did not think very fair or very just, and that they were constantly straining the rules, by which they yet declared that they were bound, in order to escape from them. By the time at which Lord Eldon was Lord Chancellor the rules of law which had to be applied when the question was raised whether a particular disposition, contained in either a will or a deed inter vivos, was such as would be enforced by the law, as not being inconsistent with the interests of the public or the policy of the law, or the rules which had been laid down with regard to the policy of the law, had come to be tolerably well ascertained. Under these circumstances I think that, if we find decisions of that date based upon the assumption that the law had been settled up to that time, we ought not to depart from them, unless there is reason to suppose either that they have been questioned in subsequent cases, or that they have not been accepted by conveyancers and by the profession generally as being sound decisions which could be safely acted upon. Speaking for myself, I cannot regard the present state of the law as very satisfactory. I do not suppose any one would say that it is desirable in the interests of the community that gifts should be treated as valid which distinctly encourage celibacy and discourage marriage. On the other hand, I do not suppose any one would say that every partial restraint of marriage is an injury to society and ought to be treated as null and void. Possibly some middle line should be drawn, and it might be said that in each case we have to consider whether the particular condition in partial restraint of marriage is a reasonable one looking at matters from the point of view of the community. But, in my opinion, we are not really in a position to deal with such matters according to our own view of what might or might not be desirable for the community. I think we are bound to follow the decisions of Lord Eldon in *Dashwood* v. *Lord Bulkeley* (1) and Sir William Grant in *Lloyd* v. *Branton*. (2) If I had to

(1) 10 Ves. 230. (2) 3 Mer. 108; 17 R. R. 33.

consider the question whether it is in the interest of the community to allow a restraint upon a woman's freedom of marriage to be continued during the whole of her life, unless her marriage were with the consent of a named person, I might perhaps come to the conclusion that this would not be to the interest of the public. But, as I have said, I think I am not entitled to consider any such question, and the only matter which I have to consider is whether the cases which I have mentioned do lay down the law in such a way that the condition in the present settlement is valid according to law and can be enforced. I have come to the conclusion that those decisions do shew that this condition is valid and can be enforced, and that we are bound to give our decision accordingly.

I will deal first with *Lloyd* v. *Branton*. (1) There can be no doubt that in the result it was held in that case that, there being a condition under which the marriage of a lady without consent was to operate as a forfeiture of her interest, there being also a gift over in the event of forfeiture, it was a valid condition, and that the forfeiture must take effect, although the consent would have to be obtained after she had attained the age of twenty-one. That being the result of *Lloyd* v. *Branton* (1), let us see what is the real ground upon which we are asked to reverse the decision of Warrington J. As it seems to me, the outcome of it is this: it is said that if we construe the clause as meaning that the consent required is to be necessary during the whole life of the daughter, now Lady Turner, the condition would be an unreasonable one, and although the restraint on marriage is partial, not general, and there is a gift over, yet the Court ought to say that this provision for forfeiture is inconsistent with the freedom of marriage and must be treated as null and void. It seems to me that that contention is rendered impossible by the decisions in *Lloyd* v. *Branton* (1) and *Dashwood* v. *Lord Bulkeley*. (2)

I will not deal at length with the other points which have been made. It is said that we ought not to construe the deeds as shewing that the settlor intended that the condition of

(1) 3 Mer. 108; 17 R. R. 33. (2) 10 Ves. 230.

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obtaining the required consents to the marriage of the daughter should extend beyond her age of twenty-six. We have heard the arguments upon that point, and I think we have all come clearly to the conclusion that we cannot put such a construction upon the deeds.

It may be quite true, and I think it is true, that in several of the cases which have been cited there was a great straining by the Court of the words of the instrument then in question in order to avoid a forfeiture. But we have come to the conclusion that there is nothing in the words of these successive deeds which would justify us in saying that the necessity for consent was to come to an end as soon as the daughter had arrived at the age of twenty-six.

Then it was said that in this case there is no gift over. If there were no gift over I agree that there would be great difficulty in supporting this condition, and the forfeiture which is based upon the breach of it. But to my mind it is perfectly clear that there is a gift over, and, as was pointed out in the course of the argument, it is to take effect not only in the case of the breach of the condition with respect to marriage with consent, but also in the event of the death of Lady Turner without issue. Under these circumstances it seems to me plainly impossible to say that there is no gift over.

That leads us to the result, first, that there is a condition necessitating the consent of the settlor's widow and the two brothers, or the survivors or survivor of them, to any marriage of the daughter, and that this condition remains in force during the whole life of the daughter, provided that the persons who are to give the consent or any of them are living; and, secondly, that there is a plain gift over.

That being so, the question arises whether the law has been so definitely settled by *Lloyd* v. *Branton* (1) and *Dashwood* v. *Lord Bulkeley* (2) that we are bound by those decisions. In my opinion the law has been thus definitely settled. As regards *Lloyd* v. *Branton* (1), it was not suggested by Sir Edward Clarke that the facts were not such that the decision by implication involved a decision of this point adverse to

(1) 3 Mer. 108; 17 R. R. 33. (2) 10 Ves. 230.

him. Neither was it said that the question was not raised in argument. But it was said, and was accurately said, that Sir W. Grant M.R. did not in terms deal with this question. Let us see how that really stands. The question had been raised, and the Master of the Rolls was obviously extremely anxious, if he could, to support the settlement, so as to prevent the forfeiture taking effect. The Master of the Rolls said (1): "It is now too late to raise a doubt on the legality of the condition on which Mrs. Barnard's right to the bequests given her by the will is made to cease." Now the condition to which the Master of the Rolls was referring was that, if Mrs. Barnard should marry without the consent of specified persons, her interest under the will should be forfeited, and the condition was not limited to her infancy or any specific time. Then the Master of the Rolls continued: "In the modern case of *Dashwood* v. *Lord Bulkeley* (2) the validity of such a condition does not seem to have been considered as at all open to controversy, although it was not confined to marriage under twenty-one." The latter words shew that the question whether it was essential to the validity of the condition that it should be confined to marriage under twenty-one was distinctly before the Master of the Rolls. The only objection that Sir Edward Clarke was able to take to *Lloyd* v. *Branton* (3) was that the decision was not justified by *Dashwood* v. *Lord Bulkeley*. (2) I think I may say that Sir Edward Clarke in terms admitted that *Lloyd* v. *Branton* (3) was conclusive against him, unless we accepted his view of the construction of the successive deeds, and that the only way in which he could get rid of *Lloyd* v. *Branton* (3) was by saying that it was based upon *Dashwood* v. *Lord Bulkeley* (2), and that *Dashwood* v. *Lord Bulkeley* (2) did not really determine the point which Sir William Grant assumed that it did.

I will now say a few words about *Dashwood* v. *Lord Bulkeley*. (2) The report shews that in the first instance there was a decree of Lord Rosslyn, which is set out at p. 236: "By the decree, pronounced by Lord Rosslyn, on the 25th of

(1) 3 Mer. 116. (2) 10 Ves. 230.
(3) 3 Mer. 108; 17 R. R. 33.

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April, 1796, it was declared, that the plaintiff Elizabeth Dashwood was entitled to the sum of 400*l.* a year under the will." That is, she was entitled to the reduced sum only which was to come to her in the event of her marrying without the required consent. Then the report goes on: "After the death of Mr. Dashwood a petition of rehearing was presented by his widow; insisting, that she did not by her marriage under the circumstances forfeit any of the bequests under the will." Then there is the argument of the case. It is quite true that the point as to the validity of the condition was not the only point made. There was also an argument whether there had been any breach of the condition. When the Lord Chancellor gave his judgment it is quite true, as was pointed out by Sir Edward Clarke, that he did not actually deal with the point whether a condition requiring consent to marriage during the whole life was valid or not, but at the same time it is plain from the account of the argument that the point was raised before him, and raised in the most specific way. Then the Lord Chancellor at the end of his judgment said (1): "Upon the whole, I cannot reverse this decree without some principle that will stand the test of general application; and, though I seriously wish I could, I dare not say I have found such a principle." It is impossible to read that report without seeing that the very question, whether a condition requiring consent to marriage not only up to the age of twenty-one but during the whole life of the lady was a valid condition which could be enforced in law, was present to Lord Eldon, that point having been brought prominently before him by the facts and by the argument. When, then, we find Lord Eldon anxious if he can to avoid a forfeiture and winding up his judgment with the words which I have just read, is it possible to avoid the conclusion that he deliberately meant to say that he could not accept the principle that a condition providing for a forfeiture upon marriage without consent was void unless the necessity for that consent was limited to the infancy of the man or the woman, as the case might be?

Under these circumstances I have no hesitation in saying

(1) 10 Ves. 246.

that those two cases are directly in point, and that they are binding on us.

Both Lord Eldon and Sir William Grant treated the point, not as a new one, but as one which had been settled before, and our attention was called to a decision of Lord Hardwicke, which Mr. Rowden said was probably the case to which Lord Eldon referred when he treated the law on this point as being already settled. Mr. Rowden may be quite right, but it was not necessary to refer to that particular case as being the only one in which the point had been decided, for it was decided by Lord Keeper Wright in *Aston* v. *Aston* (1) in 1703. The third proposition stated by the Lord Keeper was this: "that in case of marriage without consent, although but a condition subsequent, the Court cannot relieve against the forfeiture, by reason of the devise over; although it be a hard condition, no time being limited, but goes to a marriage at any time, even after the age of twenty-one." This being so, I think it is not easy for us to quarrel with the historical accuracy of this view of Lord Eldon and Sir William Grant, that in their days it was too late to say that the extension of the necessity of the consent to a period after infancy had come to an end renders the condition for the forfeiture of the property void in a case in which there is a gift over.

I think, therefore, there is really nothing more for us to decide in the present case than, first, that, according to the true construction of these successive deeds, there is a condition which operates not only until the attainment of the age of twenty-six by the daughter, but extends to the whole of her life, provided that any of the persons whose consent is required survives, and that there is a gift over. And, inasmuch as Lady Turner has married without the consent of the survivor of those persons, I think we are bound by the decisions in *Lloyd* v. *Branton* (2) and *Dashwood* v. *Lord Bulkeley* (3) to hold that her interest and the interests of her possible children under the settlement have been forfeited. I should have been very glad if we could have decided otherwise.

(1) 2 Vern. 452.
(2) 3 Mer. 108; 17 R. R. 33.
(3) 10 Ves. 230.

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ROMER L.J. I am of the same opinion. First, on the question of the construction of the deed of settlement as varied by the deeds-poll, I can only say that I agree with the view which was taken by the learned judge in the Court below. I cannot see my way to limit clause 9, as altered by the deed-poll of May 22, 1891, so as to confine the gift over to a marriage under the age of twenty-six years. Moreover, there is to my mind a clear gift over, and there is therefore no ground for the argument that the condition was imposed merely in terrorem.

That being so, the only remaining question is whether the gift over on the marriage of this lady without the consent of her mother and the two brothers, or of the survivors or survivor of them, can be held to be void as being in restraint of marriage. It is to be observed that it is not in general restraint of marriage—it is in partial restraint only, and there are many cases in which conditions subsequent imposing partial restraints of marriage have been held good. As regards the form of condition which we have here—a limited restraint of marriage with a gift over in the event of marriage without the required consent—there are, as my Lord has pointed out, two clear decisions of Lord Eldon and Sir William Grant which shew that such a condition is valid.

My Lord has so fully dealt with those cases that I need not refer to them at any length. It is to be noticed that in *Dashwood* v. *Lord Bulkeley* (1) Lord Eldon was anxious, if he could, to find any principle on which he could hold that the gift over did not take effect. He commenced his judgment by saying (2): "I have looked through all the cases upon this subject, with a very anxious wish to find a principle for reversing this decree, which I dare trust as a principle to govern future cases; and, though a review of the authorities has brought back to my mind many considerations that formerly affected it in this case, I dare not say this case will do within any such principle as the Court has acted upon." It is impossible to suppose that Lord Eldon in considering the case did not consider the more general question whether

(1) 10 Ves. 230. (2) 10 Ves. 241.

such a condition as that which he had before him was void. He did not specifically deal with that question in his judgment, obviously because he thought that at that time such a contention could not be satisfactorily raised. And it is equally clear, when you read Sir William Grant's judgment on the similar point which he had before him, that he regarded it as too late in the day to raise the question of the invalidity of such a condition. That being so, how much more impossible is it for this Court, after the lapse of nearly a century since the decision in *Lloyd* v. *Branton* (1), to take upon itself to reverse in principle those two decisions, not to mention the earlier decision, *Aston* v. *Aston*? (2) And that difficulty is increased by this fact—that, though the counsel for the appellant have obviously exercised great care in searching for authorities, there is apparently not a single case to be found in the books which militates against the principle of those two decisions of Lord Eldon and Sir William Grant—not a single recorded case which would justify the contention for the appellant. Moreover, I cannot help thinking that, after this long lapse of time, those decisions must have been acted upon in many settlements and wills, and it would, in my opinion, be lamentable, after such judgments as those have been for so long acquiesced in and acted upon, if dealings on the footing of their being good law should now be upset by us.

Under these circumstances it seems to me impossible for us sitting here to accede to the views of the appellant's counsel, and I think the appeal must be dismissed.

COZENS-HARDY L.J. I agree. I will not add anything on the question of the construction of these deeds, which seems to me reasonably plain.

I think it is also reasonably clear that there is a perfectly good gift over. Suppose that Lady Turner had died a spinster, or had, after marrying with consent, died without issue, would there in that event have been a good gift over, or would the legacy have fallen into the residue? It seems to me perfectly

(1) 3 Mer. 108; 17 R. R. 33. (2) 2 Vern. 452.

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plain that there would have been a good gift over for a charitable purpose, and that is the very same gift over, which, assuming the condition to be valid, is to operate on breach of the condition.

The real point of substance is that of the validity of this condition. Now in my view this point was settled 200 years ago. In 1703 in *Aston* v. *Aston* (1) the Lord Keeper, Sir Nathan Wright, treated it as clear that a condition in partial restraint of marriage providing for a forfeiture upon marriage without consent, either before or after twenty-one, was a valid condition. In 1738 in *Daley* v. *Desbouverie* (2) Lord Hardwicke assumed that proposition, because he went into a very elaborate discussion as to whether a condition requiring consent to marriage, not limited to the age of twenty-one, had been got rid of on the ground that the evidence proved that the consent had in fact been given. That discussion would have been needless had he not adopted the view expressed by Sir Nathan Wright in 1703. Again, in 1768, Lord Camden in *Knapp* v. *Noyes* (3) does not seem to have felt any doubt that such a condition, not limited to minority, but extending over a daughter's whole life, might be valid, although he said it was not a condition likely to be found in a will, and on the construction of the will then before him he held that that was not the true effect of it. Then we come in 1788 to the great case of *Scott* v. *Tyler* (4), and, as I read Lord Thurlow's judgment, he again treated this proposition as settled. He said: "Therefore, an injunction to ask the consent, as I have said before, is a lawful condition; as not restraining marriage generally." No trace is to be found there of any limitation to marriage under twenty-one. I may remark in passing that Lord Eldon was one of the counsel who argued *Scott* v. *Tyler*. (4) Then we come in 1804—just a hundred years ago—to *Dashwood* v. *Lord Bulkeley* (5), a case which was argued by Sir Samuel Romilly and decided by Lord Eldon, and neither counsel in arguing the case nor the

(1) 2 Vern. 452.
(2) 2 Atk. 261.
(3) Amb. 662
(4) 2 Dick. 712, 721; 2 Bro. C. C. 431, 488.
(5) 10 Ves. 230.

Lord Chancellor in deciding it, although he was most anxious to help the lady, treated the question as an open one. Then we come in 1817 to *Lloyd* v. *Branton* (1), in which Sir William Grant in express terms said that it was too late to raise a doubt as to the legality of such a condition.

Under these circumstances I think it is impossible for us to differ from the decision of Warrington J., unless we are prepared (which I certainly am not) to overrule this long series of decisions extending over two centuries.

I will only add that, although our attention has not been called to any case in which the rule has been applied to a deed, as distinct from a will, I can see no ground for drawing any distinction between the two.

Solicitors: *Boxall & Boxall; Frere, Cholmeley & Co.; Solicitor to the Treasury.*

(1) 3 Mer. 108; 17 R. R. 33.

W. L. C.

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Nov. 29, 30.

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[1904 S. 385.]

Jointure—Bargain between Husband and Wife—Benefit to Husband—Fraud on Power.

The donee of a power to jointure may exercise it in favour of his wife in accordance with a bargain by which he himself is benefited, provided this is done, not by diverting from her any part of the jointure itself, but by applying it to its proper use in consideration of his getting something which he is at liberty to take for his own benefit.

A wife may hold a jointure, the whole of which is intended to be enjoyed by herself, though she has obtained it by a post-nuptial bargain with her husband and given him or his creditors as a consideration some interest in her own property. The Court will not inquire into the quantum of the consideration.

A testator devised real estate to certain uses, and declared that it should be lawful for each tenant for life under the will, either in contemplation of marriage or after marriage, to charge the hereditaments with the payment of any annual sum not exceeding 300*l.* to any woman whom he should marry for her life. In 1868 the tenant for life married the plaintiff; and in 1882, whilst they were living apart, he, in consideration of 50*l.* paid to him by her, executed a deed whereby he charged the property with the payment to her, if she should survive him, of the yearly sum of 300*l.* for her life. There was evidence that the jointure was not at that time worth 50*l.* The tenant for life died in 1902:—

Held (reversing the decision of Kekewich J.), that the transaction was not a corrupt bargain nor a fraud on the power, but that the widow was entitled to receive the jointure.

Baldwin v. *Roche*, (1842) 5 Ir. Eq. Rep. 110, approved and followed.

Whelan v. *Palmer*, (1888) 39 Ch. D. 648, overruled.

Appeal from a decision of Kekewich J.

By his will of August 8, 1851, James Delaval Shafto gave certain legacies and annuities and devised all his lands and hereditaments situate in the several townships of Throckrington and Little Bavington, in the parish of Throckrington and in the township of Great Bavington in the parish of Kirk Whelpington, to the use of his uncle Charles Cuthbert Shafto for life; then to the use of his uncle William Henry Shafto for life; then to the use of William Henry Shafto, the son of the said William Henry Shafto, for life; and after his death to

the use of the first and other sons of William Henry Shafto the younger begotten in the testator's lifetime in tail male, with divers remainders over. And he thereby declared that it should be lawful for each tenant for life under the said will, whether in actual possession of the said hereditaments or not, either in contemplation of marriage or after marriage, by any deed or deeds revocable or irrevocable, and executed by such tenant for life in the presence of one witness or more, to charge the said hereditaments with the payment of any annual sum not exceeding 300*l.* to any woman whom he should marry for her life, to be in bar of dower and freebench.

The testator died in 1857. His uncles died in his lifetime or shortly afterwards, and W. H. Shafto, the younger, became tenant for life under the terms of the will. He married the plaintiff in January, 1868. In 1871 he left her and never returned to her. In 1875 the plaintiff presented a petition for divorce against him on the ground of desertion and adultery; a decree nisi was granted, but the Queen's Proctor intervened and the decree was rescinded. W. H. Shafto the younger and the plaintiff lived apart after 1871. By an indenture of August 28, 1882, made between W. H. Shafto the younger and his wife, which recited the will, the death of the testator, that there was no charge on the property, and that W. H. Shafto the younger was desirous of exercising his power of appointment given by the will in favour of his wife Eliza Shafto, he as tenant for life, and in exercise of the power and of every other power and estate him thereunto enabling, irrevocably charged the property then or thereafter to become subject to the uses of the will with the payment to his said wife, if she should survive him, for her natural life, of the yearly sum of 300*l.* for her sole and separate use, to be paid by equal quarterly payments free from all deductions, the first payment thereof to be made three months after his decease.

W. H. Shafto the younger died on September 27, 1902, and the defendant Delaval Shafto became tenant for life in possession, and refused to admit Mrs. Shafto's right to the charge or make her any payment in respect of it. She in September, 1903, married a Mr. A. W. O. Saunders, and in

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February, 1904, brought this action for a declaration that she was entitled to the charge.

It was proved at the trial that the deed of August, 1882, was executed in pursuance of a bargain between W. H. Shafto the younger and the plaintiff that she should give him 50*l.* in return for his creating the charge. This arrangement was the result of a good deal of negotiation, and Mrs. Shafto with some difficulty raised the money and paid it to her husband at the time when the deed was executed. Evidence was given by an actuary that, considering the ages of Mr. and Mrs. W. H. Shafto, the reversionary charge of 300*l.* a year was not worth in August, 1882, so much as 50*l.*

Kekewich J. held that the transaction was contrary to the intention of the testator, and was a corrupt bargain and a fraud on the power. The wife had paid more than the jointure was worth; therefore the only person who received any benefit was the husband. His Lordship gave judgment for the defendants.

The plaintiff appealed.

Stewart-Smith, K.C., and *Martelli*, for the plaintiff. It is submitted that there has not been a fraud upon the power. It cannot be doubted that in the case of a power to distribute a fund the donor could not exercise it for his own benefit. But a power to jointure stands in a different position. It may be exercised in such a way as to benefit, not only the wife, but the husband.

[ROMER L.J. Could the husband sell the power?]

He might sell it to his wife. Probably in the present case the husband's dominant motive in exercising the power was to benefit himself. It is a common thing to provide in a settlement that the wife's fortune shall be paid over to the husband in consideration of his exercising in her favour a power to jointure. Before the Dower Act any grant of a jointure to a wife would free the husband's real estate from dower. A power to jointure enables a man to marry a woman of fortune and to obtain by bargain an interest in her property. No case can be found in which, the wife being the sole

beneficiary, the exercise of a power of jointuring has been set aside on the ground that she had given consideration for it.

In *Lord Tyrconnell* v. *Duke of Ancaster* (1) power was given by a will to jointure a wife to the extent of 100*l.* for every 1000*l.* which the husband should receive as her portion upon the marriage, and the donee on his marriage, in consideration of the marriage and of the wife's portion of 10,000*l.*, exercised the power in her favour. This was treated by the Court as a valid exercise of the power.

Provided that the power is not exercised for the husband's benefit, it is no objection that the wife gives consideration for it: Sugden on Powers, 8th ed. pp. 610, 612; Farwell on Powers, 2nd ed. p. 434; *Baldwin* v. *Roche* (2); *Aleyn* v. *Belchier*. (3)

In *Lane* v. *Page* (4) it was held that a jointure could be severed—the part taken by the wife upheld, and the part taken by the husband or his creditors rejected. In the present case the whole of the jointure is taken by the wife, so no case of severance arises; but *Lane* v. *Page* (4) is important, because it shews that a jointure may be partly good even though the charge was made in consideration of a bargain between husband and wife under which the husband took the chief benefit. In that case, too, the jointure itself was partly to go to the husband, and the bargain was therefore corrupt.

The distinction between powers of jointuring and powers to appoint to children was pointed out, and *Lane* v. *Page* (4) was commented on in Sugden on Powers, 8th ed. p. 611, and *Daubeny* v. *Cockburn* (5), in which it was held that a fraud on the power made the whole transaction void. On the other hand, in *Rowley* v. *Rowley* (6) it was said that a jointure was severable.

[VAUGHAN WILLIAMS L.J. There is no question here of severance. This jointure must be wholly good or wholly void.

ROMER L.J. It was difficult to say that no consideration could be given by the wife for a jointure, for in many

(1) (1754) Amb. 237.
(2) 5 Ir. Eq. Rep. 110.
(3) (1758) 1 Eden, 132.
(4) (1754) Amb. 233.
(5) (1816) 1 Mer. 626; 15 R. R. 174.
(6) (1854) Kay, 242.

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settlements there were bargains of that kind, and it would not have been expedient to upset them.]

The word "jointure" implies that the wife gives consideration for it. It was originally limited to the husband and wife, and then to the survivor of them.

In *Whelan* v. *Palmer* (1) Kekewich J. held that an appointment of a jointure was altogether bad, because there had been a bargain between husband and wife whereby she gave consideration for the appointment. We submit that that decision was wrong and cannot be supported; a bargain does not invalidate an appointment of a jointure even though the husband gets a benefit by it. The point is covered by *Baldwin* v. *Roche* (2), which has always been accepted as an authority.

Warmington, K.C., and *T. C. Jarvis*, for the respondents. The appointment is void. In dealing with questions of appointments the Court looks at the substance, not at the form of the transaction. As a matter of form this appointment is no doubt unobjectionable. But a person who has a power of appointment for the benefit of another cannot, as a general rule, exercise it for his own benefit. That rule does not apply to jointures in cases where the wife gets the real and substantial benefit. There is no case in the books in which an appointment by way of jointure under which the husband took the substantial benefit has been upheld: Sugden on Powers, 8th ed. p. 612. A fraud on a power means the imposition as an object of the power of a person not intended by the settlor to be benefited. In this case the husband took the whole benefit when he took the money value of the jointure just as much as if he had taken part of the jointure itself: *Topham* v. *Duke of Portland*. (3) There is no case in which a jointure has been upheld where it was created as the result of a bargain between husband and wife, made after marriage, that the wife should give consideration for it. The evidence shews that the wife gave the husband more than the reversionary jointure was worth. So the husband took the whole benefit, and that is equivalent to taking part of the jointure itself. *Baldwin* v. *Roche* (2) is the

(1) 39 Ch. D. 648. (2) 5 Ir. Eq. Rep. 110.
(3) (1863) 1 D. J. & S. 517.

only case which says that a power to jointure can be used for the husband's benefit if he does not under it take part of the jointure itself. That decision is not binding on this Court. The decision in *Lane* v. *Page* (1) did not turn upon the fact that the consideration was not paid out of the jointure itself. It is immaterial that Mrs. Shafto did not pay the 50*l.* out of the jointure. If the husband's debts are to be paid out of the jointure the jointure is bad: *Aleyn* v. *Belchier* (2); *Daubeny* v. *Cockburn* (3); *In re Turner's Settled Estates.* (4) If the appointor cannot exercise the power directly for his own benefit he cannot do so indirectly. The marriage consideration in a settlement is on a different footing from a pecuniary consideration.

[No reply was called for.]

VAUGHAN WILLIAMS L.J. This is an appeal from a decision of Kekewich J., that an appointment made in 1882 by a tenant for life, having a power of jointuring of 300*l.* a year, of the whole amount to his wife, in consideration of a present payment to him by her of 50*l.*, was invalid. Kekewich J. arrived at this conclusion upon the basis that there was a corrupt bargain between the husband and wife —a bargain which he thought was intended to benefit the husband solely. The evidence upon which he came to this conclusion was this. There was correspondence between the husband and wife by which it appeared that the husband said that he would only execute this power to jointure in favour of his wife if she would pay him the sum of 50*l.* Then there was the evidence of an actuary that 50*l.* was the full market value of the annuity secured by the jointure, having regard to the respective ages of the husband and the wife. Kekewich J. came to the conclusion that that made it an arrangement solely for the benefit of the husband, and that, for that reason, it was a corrupt bargain and a fraud upon the power. I cannot agree with the learned judge's decision in this case. In his judgment he fully recognised the distinction between the

(1) Amb. 233.
(2) 1 Eden, 132.
(3) 1 Mer. 626; 15 R. R. 174.
(4) (1884) 28 Ch. D. 205, 217.

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execution of a power of jointuring and the execution of a power to appoint in favour of children; but he nevertheless came to the conclusion that this execution of the power to jointure by the husband, being solely for the benefit of the husband, was a fraud upon the power. If the bargain made between the husband and the wife had been a bargain dealing with the actual jointure itself, a bargain under which the wife only got part of the sum secured by the jointure and the residue of it was paid to some nominee or creditor of the husband, I should have entirely agreed with the decision of Kekewich J.; but the learned judge seems to have thought that inasmuch as the money paid by the wife was, according to the evidence of the actuary, the full value of that which she was to get, it placed the case upon the same level as if that which had been the subject of the bargain had been a disposition of a part of the jointure itself. However much one is to look at substance and not at form, I cannot agree with that conclusion.

I think that, before I deal with the case generally, this is perhaps a convenient moment to say that I think that Kekewich J. was to a large extent following his own decision in the case of *Whelan* v. *Palmer*. (1) In my opinion that decision cannot be supported any more than the present decision can be supported, because, to my mind, it neglects, as this decision seems to me to do, the distinction between dealing with the jointure itself and a bargain by which, in return for the giving of a consideration by the wife, she is left entitled on the death of her husband to receive the whole of the jointure. I think, therefore, that our decision must be taken as affecting not only the present case, but also the case of *Whelan* v. *Palmer*. (1)

Now in the present case we have had our attention called to an authority which practically disposes of the case, if it is one which we ought to follow. The case which I am referring to is *Baldwin* v. *Roche*. (2) In one sense this decision in the Irish Courts does not bind us, although it is a case which, having regard to the eminence of the judges who were parties to the judgment, we should pay the very greatest attention to.

(1) 39 Ch. D. 648. (2) 5 Ir. Eq. Rep. 110.

But there is a sense in which it is binding on us in a very great degree, because it is referred to in Sugden on Powers as an authority which is in accordance with the law. The edition that I have before me is the eighth, published in the year 1861. The case is also referred to in Farwell on Powers, 2nd ed. p. 434, and is there also mentioned as a binding authority. It is plain that an authority of this sort is one which may have been, and probably has been in fact, acted upon by conveyancers and others as binding, and it would be a very serious thing now, more than forty years from the date of Lord St. Leonards' book approving so distinctly of this decision, to say that we question it. Excepting the decision, to which I have called attention, of Kekewich J., there has been no decision whatsoever in which this case of *Baldwin* v. *Roche* (1) has ever been questioned, and even in *Whelan* v. *Palmer* (2) perhaps it is not right to say that it was questioned.

I propose in the first instance to call attention to the case first referred to in Sugden on Powers, 8th ed. p. 610. That is the case of *Lane* v. *Page*. (3) It is a case in which the bargain made was one affecting the jointure itself, and part of the jointure was to go in payment of a creditor of the husband, of course after the husband's death, and the residue of the jointure was to go to the wife. Lord Hardwicke held in that case that the jointure was good as far as the wife's portion was concerned, but bad in so far as the portion going to the husband was concerned. But although we have not, in the present case, to deal with any severance of the jointure, such as that which had to be dealt with in that case, yet *Lane* v. *Page* (3) is an authority in this way—that it is quite plain that there there was a bargain between the husband and the wife; and Lord Hardwicke held that, notwithstanding the bargain between the husband and the wife, the jointure stood so far as that portion of it was concerned which the wife was to take. It may be convenient at this moment to say one word about some comments that Sir William Grant made in *Daubeny* v. *Cockburn* (4) upon that case. Sir William Grant

(1) 5 Ir. Eq. Rep. 110.
(2) 39 Ch. D. 648.
(3) Amb. 233.
(4) 1 Mer. 626; 15 R. R. 174.

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took the view that, if the execution of the jointure was fraudulent in one respect, it was bad altogether, and he did not approve of the decision of Lord Hardwicke, which held that the jointure stood as to part and was bad as to the residue. But we need not trouble with that case at all. Every one reading the judgment of Sir William Grant must be struck with the force of his reasoning, but it does not touch the case that we now have to deal with. Having made those observations upon *Lane* v. *Page* (1) and *Daubeny* v. *Cockburn* (2), I think I may pass to the judgment in *Baldwin* v. *Roche* (3), only observing that, in his observations in *Rowley* v. *Rowley* (4), Wood V.-C. recognises the authority of *Lane* v. *Page* (1), although the case which he had to deal with was not the case of a jointure, but the case of a power of appointment amongst children.

Now the case of *Baldwin* v. *Roche* (3) is a remarkable one. I do not think I can state it better or put it more shortly than it is put in the marginal note: "Tenant for life, with a power to jointure, marries; but does not exercise the power. His wife was seized of real estate for the term of her life, which, on the marriage, was settled to the use of the husband for the joint lives of himself and his wife, remainder to the wife for her life. The husband afterwards became indebted; and agreed with his wife and creditor that he would exercise the power of jointuring in her favour; and that she should grant to the creditor an annuity for the term of her life, equal in amount to the jointure, to be charged upon her estate, and to become payable upon the death of the husband: which agreement was carried into execution. The husband died. Held, that the execution of the power of jointuring was not a fraud upon the remainderman." Before I read some observations of the judges in this case, I would point out what a strong decision it is, and how completely it covers the present case, because in that case as in this the execution of the power of jointuring was an execution which took place after the marriage, and not in pursuance of any ante-nuptial agreement; moreover, the con-

(1) Amb. 233.
(2) 1 Mer. 626; 15 R. R. 174.
(3) 5 Ir. Eq. Rep. 110.
(4) Kay, 242.

sideration which the wife gave was equal in amount to the jointure. Under those circumstances, what do the judges hold? Do they hold that the fact that the wife gave a consideration to the husband—that is to say, to the husband's creditor at the instance of the husband for executing the power in her favour—rendered the bargain corrupt and a fraud upon the remainderman? Not at all. They came to exactly the contrary conclusion. I will first read a word or two which fell from Lefroy B. in the course of the argument. He says: "In both those cases" (that is, the cases of *Lane* v. *Page* (1) and *Aleyn* v. *Belchier* (2)) "the whole contract related to the jointure, and nothing else." Of course in the present case there is no contract relating to the jointure whatsoever. The wife gets the jointure. "How do you answer the common case of a settlement where the husband gets a fortune with his wife, applies it in payment of his own debts, and in consideration of it, executes the power of jointuring?" The answer which is made to that—an answer which the judges do not find satisfactory—is simply this: "The evidence shews that, though not in form, yet in substance the contract of the parties was, that the husband's debt should be paid out of the jointure." That answer was not thought sufficient, and it seems to me for the obvious reason that it still left it an absolutely true proposition that the wife was to receive the jointure in full, and no part of it was under this bargain to be taken from her. Brady C.B. says this (3): "This case has been put by the counsel for the defendant, on the only ground upon which the claim can be resisted, namely, that the Court ought to look on this transaction, not as a grant of a jointure to the wife, but as the grant of an annuity to the creditor of the husband; and if that were the whole of this case, it seems to me that it would fall within the authorities. But these authorities only go to this extent: that in the execution of a power of jointuring, which is given for the benefit of the wife, it shall not be so executed, as to be the means, colourably, of conveying an interest" (and then these words are in italics) "*in the*

(1) Amb. 233. (2) 1 Eden, 132.
(3) 5 Ir. Eq. Rep. 114.

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jointure itself, to the creditor of the husband. If the intention of the parties really is, that the jointure shall go to some third person, such intention cannot be effected by an execution of the power; for such execution of the power is not a grant of a jointure at all." Then he says: "But is that the case here?" I will only refer to one passage in the judgment of Richards B. He sets out what he conceives to be the bargain in this case between the husband and the wife (1): "I will suppose that the whole of this transaction was spread out upon the face of the jointure deed, and then it would run thus: that whereas the husband was indebted to Gash, and whereas his wife was entitled to a certain property, and was desirous to secure thereout the debt due to her husband's creditor, and that the husband was desirous of doing the same, but that if the wife did so, she would be left without an adequate provision; and, therefore, the husband agreed to secure to her a jointure charged on his lands; and, therefore, in consideration of the wife making her own property liable to the payment of this debt, the husband exercises his power to jointure, and charges the jointure upon the estate of which he was merely tenant for life. What is there fraudulent or against conscience in such a transaction? What equity has the remainderman, who takes the estate subject to the capricious exercise of that power, to complain? How is he prejudiced? I do not see how." The only other thing that I wish to call attention to is a short passage in the judgment of Lefroy B. He says this (2): "Mr. Deasy properly admits, that there is a difference between a jointuring power and a power to appoint amongst children. A jointuring power is one by which the husband may take a benefit; not a benefit by perverting that which is the subject-matter of the power, to a purpose which the donor of the power did not intend, but by applying it to its proper use, in consideration of his getting something, which he is at liberty to get, for his own benefit. It is very different from a power to appoint to children." I think that, having regard to the passages which I have just read from the judgments in that case, it is clear that, if we follow it, it absolutely disposes of the present

(1) 5 Ir. Eq. Rep. 115. (2) 5 Ir. Eq. Rep. 116.

appeal. In my judgment we ought to follow that case, first, because I think the reasoning of the learned judges is sound; secondly, for the reason that I have already given—that it is a case which has not been questioned during these forty odd years, and which probably has been acted upon again and again by conveyancers and others. Under these circumstances I think that upon the authority of that case we ought to allow this appeal, which will be, of course, with the usual consequences with regard to costs here and below.

ROMER L.J. I am of the same opinion. A power to jointure is a somewhat peculiar power, and differs in many obvious respects from the power given to a tenant for life to appoint amongst children or amongst a special limited class. It has been accordingly held that while an appointment by way of jointure (as the result of a bargain between husband and wife or between intended husband and wife) that part of the jointure shall go or be for the benefit of the husband's creditors or a stranger is bad to the extent of that part, yet the rest of the bargain may stand so far as the jointure is to be enjoyed by the wife herself. Probably one of the reasons for this view of the Courts was, that to hold otherwise would have been to invalidate the bargains so frequently made by which the husband and wife have contracted on a settlement that the wife should get a jointure in consideration of the husband obtaining an interest in her property. The Courts, very naturally, apparently have shrunk from such a conclusion, and accordingly the rule that the wife might hold a jointure intended to be enjoyed by herself, though she has obtained it by a bargain with her husband and given him or his creditors as a consideration some interest in her property, has long been recognised. It has been recognised from very early times, from *Lane* v. *Page* (1) down to the present time, with the exception of, and until, the decisions of Kekewich J. in the present case and in *Whelan* v. *Palmer*. (2)

After what my Lord has said about the cases, it does not appear to me necessary to go through the authorities. All I

(1) Amb. 233. (2) 39 Ch. D. 648.

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can say is that I think the rule I have referred to has been so long recognised and acted upon that it ought not to be departed from, and in my opinion the two decisions of Kekewich J., to which I have referred, were wrong. The present case clearly comes within the rule I have referred to, for the whole of the jointure is to be enjoyed by the wife. The circumstances that the husband and wife were separated for so long, and that she had commenced divorce proceedings against him, are not circumstances which deprived the wife of her position as such or prevented her from being a proper object of the power of jointuring. Nor do I think they are circumstances which from a legal point of view prevent the present appointment from being good, or enabling her to enjoy the benefit of the rule to which I have referred.

It follows that the appeal must succeed, and accordingly that there ought to be a declaration that she is entitled to the jointure, and an account of what is due for arrears, and an order for payment. Probably it will be sufficient if liberty to apply for a receiver is given, if that be necessary, and of course the defendant must pay the costs here and below.

COZENS-HARDY L.J. I am of the same opinion, and I have very little to add. I agree with what has been said by my Lord and Romer L.J. that a power to jointure is peculiar. It is so peculiar that I am not aware of any power which stands on precisely the same footing. The result of the authorities seems to me to be that the remaindermen cannot complain so far as the appointment of a jointure is really for the benefit of the wife in this sense—that she will take the jointure itself free from any obligation to hand over part of the jointure to anybody else. It is no objection to the validity of the jointure that the husband receives a consideration for exercising the power. That that is plainly so in the case of an ante-nuptial bargain cannot be doubted. *Lord Tyrconnell* v. *Duke of Ancaster* (1) is one amongst many authorities which shew that where, in consideration of the husband getting (I think it was 10,000*l.* in that case) part of his intended wife's property, he agrees to

(1) Amb. 237.

execute a jointure power, that will be held valid. What difference can there be if the bargain is not ante-nuptial, but post-nuptial, made not between the intended husband and the intended wife, but between the husband and a wife who is now in a position to make the contract? I cannot see what difference in principle can be made, nor do I think Kekewich J. himself thought there was any real difference. His view seemed to be that the quantum of consideration given by the wife was a matter so material as to enable the Court to say that there was no real bargain. With great respect to the learned judge, I cannot follow that. If the wife may make a bargain with her husband in this matter, the Court has really nothing to say to the question whether she has paid more or less than the actuarial value for that which she acquires by the exercise of the power. I will only say that I think the Irish case was well decided; but, whether it was well decided or not, sixty years have elapsed. It has been quoted without disapproval, and I think I may say with approval, both by Lord St. Leonards in his book on Powers and by Farwell J. in his book on Powers. I therefore agree that the appeal ought to be allowed.

Solicitors: *King, Adams & Co.; James Johnstone.*

H. C. R.

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[1902 L. 583.]

Partnership—Sale of one Partner's Share to Co-partner—Duty of Purchasing Partner—Fiduciary Relation — Misrepresentation — Concealment — Suppression of Material Facts—Non-disclosure—Subsequent Knowledge by Selling Partner—Rescission of Contract, Equitable Right to—Action for Fraudulent Representation — Compromise — Consent Order, Effect of — Affirmation of Transaction — Waiver of Rights — Estoppel — Election by Selling Partner to affirm Sale—Time for Election.

It is clear law that, in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows; and that, unless such information has been furnished, the sale is voidable and may be set aside: *Maddeford* v. *Austwick*, (1826) 1 Sim. 89; 27 R. R. 167.

But if the vendor, on discovering that certain material facts have been concealed from him by the purchaser, and though believing that there has been a concealment of further material facts, nevertheless does acts constituting a deliberate election on his part not to insist on his right to a full disclosure, he is bound by that election, and neither he nor his representatives after his death can afterwards, on discovering the full extent of the concealment, repudiate the sale.

There is no authority for the proposition, and it is contrary to principle, that the duty of full disclosure resting on the partner purchasing from his co-partner is such that the purchasing partner cannot rely on any binding election on the part of the selling partner unless and until full disclosure has been made.

Decision of Kekewich J. affirmed.

Prior to the year 1874 William Law, James Law, Samuel Law, and Joseph Law carried on the business of woollen manufacturers at Greetland, Halifax, as co-partners with their father, John Law, under the style of John Law & Sons, and after the death of their father in 1874 the business was carried on by the four sons under the same style, James taking the principal part in the management of the business. This business was carried on without any articles of partnership, the four sons being entitled to the business in equal shares.

Samuel Law died in 1893, having by his will given his residuary estate, forming the bulk of his property, to his three surviving brothers in equal shares, the same to remain in the partnership business. After his death the three surviving brothers continued to carry on the business as before. In 1899 Joseph Law died, having by his will given his residuary estate equally between his surviving brothers, and after his death the business was carried on by William Law and James Law. William Law had for some thirty years lived in London, acting as the London representative of the firm; but latterly he had taken no active part in the conduct of the business. The accounts of the partnership were kept very irregularly, but for many years Joseph Law had been in the habit of paying to William Law monthly sums amounting on the average to about 600*l.* a year in respect of his share in the business, William never asking for any account. It appeared that William and James were not on very affectionate terms, and that their relations with each other were confined purely to matters of business.

In the year 1899 William, who was then seventy-three years of age, applied by letter to James for further moneys out of the firm, to which James replied that he was not prepared to let him have any more money, but would be willing to buy him out. William assented to this, and accordingly, on March 21, 1900, James wrote to him offering to purchase his share for 10,000*l.* William Law then consulted a London solicitor, Mr. C. E. Lacy, who went down to Greetland on behalf of his client for the purpose of negotiating for the sale of his share. At that time James was himself of advanced age and in infirm health, and he was assisted in his business affairs by his daughter, Rachel Law, who lived with him.

On going down to Greetland, Mr. Lacy had an interview with James Law, Rachel Law, and James Law's solicitor, Mr. Garsed, and discussed with them the proposal for the sale of William's share of the business. No books were produced at that interview, and in fact it appeared that Mr. Lacy had received instructions from William not to go into the books at

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all, William's sole desire being to have a clear income of about 700*l.* a year secured to him; but on the same day, after the interview, Mr. Lacy accompanied Mr. Garsed to the latter's office, and was then shewn the probate valuations of the estates of Samuel Law and Joseph Law, though these gave no details of the assets of the business. Mr. Lacy also had a balance-sheet of the firm.

The result of the negotiations was that Mr. Lacy, on behalf of William Law, agreed to sell his client's interest in the business and in the estates of Samuel Law and Joseph Law to James Law for 21,000*l.* This agreement was carried into effect by two deeds dated July 2, 1900, and by these deeds the purchase-money was to be paid, as to one-half, on the execution of the deeds, and, as to the other half, on January 2, 1901, that second half being secured by James Law's bond. The first instalment was duly paid upon the execution of the deeds. On the same day a deed of dissolution of the partnership was executed.

As the time approached for payment of the second instalment disputes arose as to the form the receipt should take. This led to a writ being issued upon the bond on January 8, 1901, by William and certain persons to whom he had assigned the bond as trustees, but the matter was settled a few days afterwards, on January 18, 1901, by payment by James of the second instalment, with interest and costs. The assignment of the bond to trustees was made on the advice of counsel after the discoveries next hereinafter mentioned.

Shortly after the execution of the deeds of July 2, 1900, William Law discovered that there were certain assets of the partnership, consisting of mortgages, the existence of which had been previously known to James alone, though James had not disclosed them during the negotiations for the sale; and subsequently he discovered that there were several other undisclosed assets known to James alone, the total of the undisclosed assets amounting in value to several thousands of pounds. Notwithstanding these discoveries, however, William or his trustees, as above stated, accepted payment on January 18, 1901, of the balance of purchase-money; but four days afterwards,

on January 22, 1901, he brought an action in the King's Bench Division against his brother James for damages for alleged fraudulent representation upon the sale of the share in the business. On February 25, 1901, a consent order was made in that action staying all further proceedings upon the terms of an agreement dated February 15, 1901, whereby the plaintiff withdrew all charges of fraud or fraudulent representation, and the defendant was to pay to the plaintiff the sum of 3550*l.*, "the same to be taken as in discharge of every claim relating to any matter whatever between the plaintiff and defendant and to be accepted in full satisfaction thereof. In particular, this settlement shall include all matters with regard to John Law deceased, the business of John Law & Sons, the estate of Samuel Law deceased, and the estate of Joseph Law deceased." That sum of 3550*l.* was duly paid. Before this settlement of the action was arrived at, William had ascertained that there were still further partnership assets which had not been disclosed by James, and he believed there might be others.

Subsequently to the date of the consent order William again made further discoveries of undisclosed assets, amounting to, it was said, about 80,000*l.*, which had been invested in the names of James and Joseph only. Accordingly, on March 19, 1902, he issued the writ in the present action against the executors of James Law, who had died in August, 1901, and the executor of Joseph Law, for a declaration that the two deeds of July 2, 1900, and the consent order of February 25, 1901, were not binding on him, and ought to be set aside, and for accounts and inquiries usual in a partnership action, with consequential relief.

On March 18, 1903, the plaintiff, William Law, died, whereupon the action was continued by his executor as plaintiff.

The statement of claim alleged that James Law, in breach of his duty towards William, had omitted to inform him and Mr. Lacy, his solicitor, of, and in fact concealed from them, the existence of the undisclosed assets, and that neither of them had any notice or knowledge at the date of the sale of July 2, 1900, of the existence of those assets.

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In their defence the defendants, the executors of James Law, admitted that certain mortgages had been executed in favour of James Law and Joseph Law, but denied that they or any of the so-called undisclosed assets formed part of the partnership assets; and they alleged that James Law owed no duty to the plaintiff to inform him of these assets, and in no way improperly concealed their existence from him. They further alleged that whether or not William had knowledge or notice of the existence of the undisclosed assets, he was in fact well aware in January, 1901, that there were or had been securities executed at some time or other in favour of, and assets belonging to, James Law and Joseph Law or one of them, the details of which had not been disclosed to him by them or one of them, and that the settlement come to by the consent order in the King's Bench action was so come to on the footing that there were in existence securities and assets not disclosed to William as to which there might be a question whether in point of law they ought to be treated as assets of the partnership or not. In any event, they submitted that the consent order in the King's Bench action of February 25, 1901, operated as an estoppel as regarded the whole of the relief claimed in the action. They also submitted, as a point of law, that the bringing by William of the action on the bond, with his knowledge of the alleged undisclosed assets, amounted to an irrevocable election on his part to affirm the sale of July, 1900, and that he was, by reason of that election, precluded from obtaining rescission of the sale or any relief founded on or incidental to such rescission, and that his executor, the present plaintiff, was also so precluded. And they further submitted that, similarly, the bringing by William of the later King's Bench action amounted to an irrevocable election on his part to affirm the sale, precluding him and his executor from such relief. Finally, they further submitted that both William and his executor were in any event precluded by laches and delay from obtaining any such relief. A separate defence on the same grounds was put in by the defendant, the executor of Joseph.

In his reply the plaintiff again insisted on the absolute

ignorance of William, at the date of the consent order, of the existence of the undisclosed assets, and reasserted the concealment by James Law of their existence.

The action was tried, with witnesses, before Kekewich J. on February 23, 24, 25, and March 1, 1904. Several witnesses were called on both sides, and a very large amount of correspondence was read. The partnership books had been kept, as the learned judge observed in the course of the argument, in a very incomplete state. The general effect of the evidence sufficiently appears from the arguments below and on appeal, from the findings of the learned judge in his judgment, and from the considered judgment of the Court of Appeal.

Neville, K.C., *Stewart-Smith*, K.C., and *F. Thompson*, for the plaintiff, contended that there was a fiduciary relation subsisting between James and William by reason of the partnership, and that James, as managing partner, was, when purchasing William's share, under a positive duty to make the fullest disclosure of the assets to the selling partner, William; and, further, that, in the circumstances of the case, the objection based upon the non-disclosure of the assets applied as well to the settlement of the second King's Bench action as to the original transaction.

[They referred to *Maddeford* v. *Austwick* (1); Lindley on Partnership, 6th ed. p. 314; *Gibson* v. *Jeyes* (2); *Ex parte James* (3); *Morse* v. *Royal* (4); *Farrant* v. *Blanchford*. (5)]

[KEKEWICH J. pointed out that the allegations in the statement of claim amounted in effect to a charge of fraud against James Law. That seemed inconsistent with the consent order in the second King's Bench action, the charges of fraud and misrepresentation in which action were expressed in that order to have been withdrawn.]

Although the facts alleged in the present action may be held to have amounted to fraud, we are basing our claim to relief,

(1) 1 Sim. 89; 27 R. R. 167.
(2) (1801) 6 Ves. 266, 278; 5 R. R. 295.
(3) (1803) 8 Ves. 337, 352; 7 R. R. 56.
(4) (1806) 12 Ves. 355, 372; 8 R. R. 338.
(5) (1863) 1 D. J. & S. 107, 119.

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not actually on "fraud," but to a breach of duty between two partners. It may be, however, that the evidence supporting our case may disclose facts which might have justified an action for fraud.

[They also referred to *Denton* v. *Donner* (1) and *Dunne* v. *English*. (2)]

Sir E. Clarke, K.C., P. O. Lawrence, K.C., and *George Lawrence*, for the defendants, the executors of James Law, contended that the only one of the cases cited on behalf of the plaintiff that related to partners was *Maddeford* v. *Austwick* (3), and that was a case of fraud. *Knight* v. *Marjoribanks* (4) was a case of partners, and there it was held that the settlement of a dispute between parties will not be upset unless the Court finds there has been fraud. Here fraud has been practically disavowed as a ground of the plaintiff's claim, and non-disclosure only is relied upon. We submit that, on the evidence, there is no trace of any concealment by James from William at the time of the proposal for the purchase of the latter's share; that William did not wish to be put to the trouble of investigation, but only to be secured in an income of 700*l.* a year. We ask your Lordship to negative the allegation of fraud by a finding of fact.

Warmington, K.C., Warrington, K.C., and *Austen-Cartmell*, for the defendant, the executor of Joseph Law, referred to *Elsey* v. *Adams* (5) as an authority against upsetting the settlement come to by the consent order.

Neville, K.C., in reply, referred to *Wilding* v. *Sanderson* (6) and *Kempson* v. *Ashbee*. (7)

KEKEWICH J., in delivering judgment, held that the charge of fraud made by the statement of claim had been disproved by the evidence. As to the contention that it was the duty of James Law to disclose the assets to Lacy, who was acting for William Law, his Lordship did not think it necessary to decide that question, and he expressed no opinion about it. He pro-

(1) (1856) 23 Beav. 285, 290.
(2) (1874) L. R. 18 Eq. 524, 534.
(3) 1 Sim. 89; 27 R. R. 167.
(4) (1848) 11 Beav. 322, 350, 353.
(5) (1864) 2 D. J. & S. 147.
(6) [1897] 2 Ch. 534, 550.
(7) (1874) L. R. 10 Ch. 15.

posed to dispose of the case upon the settlement which was made in February, 1901, of the action in the King's Bench Division. The plaintiff brought that action knowing at that time that there had been what he called "fraudulent representations," knowing that there were assets outstanding which had not been taken into account, and knowing that he had not received his full share of the assets. With that knowledge, and with the knowledge that he could obtain full discovery in the action, he chose to take 3550*l.* in settlement of all claims. He was prepared to take that sum to settle the litigation, put an end to disputes, and avoid the troublesome taking of the accounts, and going into all the matters in question. In his Lordship's opinion it would be against common sense and common honesty that the plaintiff should be allowed to say that he accepted that sum only in settlement of his claim in respect of the non-disclosure of certain assets, and now to claim to go into the question of the non-disclosure of other assets. The plaintiff's claim entirely failed, and there must be judgment for the defendants, with costs.

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The plaintiff, the executor of William Law, appealed.

The arguments on the appeal were heard on November 7, 8, 9, 10, 11, 12, and 14, 1904.

Neville, K.C., and *F. Thompson*, for the plaintiff. The real ground of the action is non-disclosure by the purchasing partner to the selling partner of the state of the business and the amount of the assets. Since the compromise of the former action the plaintiff has discovered that partnership assets to the amount of 80,000*l.* were not disclosed to him. It is submitted that if one partner, who has knowledge of all the facts relating to the business, purchases the share of another partner, suppressing the existence of some assets of which he knows and the other does not, the transaction cannot stand. In equity the rule is the same as regards the original contract for sale, and a compromise of an action to set it aside. A trustee may bargain with his cestui que trust for the purchase of the interest of the latter in the trust property, but he must disclose

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to the vendor all the information about the property which is in his possession as trustee: Lewin on Trusts, 11th ed. pp. 566, 576. This applies to any person who stands in a fiduciary relation to another, and especially to a partner who is purchasing the share of his co-partner. "The utmost good faith is due from every member of a partnership towards every other member": Lindley on Partnership, 6th ed. p. 314; *Dunne* v. *English*. (1) The onus of proving the disclosure is on the purchaser. Here the purchasing partner was the manager of the business, and had full knowledge of the value of the assets. Before he could bargain with his co-partner it was his duty to give him full information about the assets, and if without doing this he enters into a contract to purchase his co-partner's interest the contract will be void. In the present case an actual breach of trust had been committed by investing partnership assets in the names of two partners only. The brother James was the survivor of those two.

The real question is whether, in the case of a purchase by one partner of another partner's share in the partnership, there arises such a relation of trustee and cestui que trust as to require the purchasing partner to disclose to the selling partner all material matters that are within his, the purchasing partner's, own knowledge, just as in the case of a trustee purchasing from his cestui que trust. We submit that that fiduciary relation with all its obligations does arise as between partners in such a case. The present case does not fall within such an authority as *Campbell* v. *Fleming* (2), where it was held that a person who chose to act after knowledge of a fraudulent representation was bound. That was the case of a purchase from a stranger, who sold under a fraudulent representation, and does not apply to this case, which is one of fiduciary relation, to which entirely different principles must be applied. The limitations to the right of relief on the ground of fraud laid down in *Campbell* v. *Fleming* (2) do not apply to a trustee and his cestui que trust, or to any person standing in a fiduciary relation to another, and so bound to make a full disclosure to that other.

(1) L. R. 18 Eq. 524, 534. (2) (1834) 1 Ad. & E. 40; 53 R. R. 194.

[*Warmington, K.C.*, for the defendant, the executor of Joseph Law. *Campbell* v. *Fleming* (1) is referred to in *In re Duncan* (2) and in *Clough* v. *London and North Western Ry. Co.* (3)]

Uberrima fides is especially demanded in all partnership dealings, for one partner may have knowledge of matters not within the knowledge of the other partners. The rule is thus stated in an earlier and more authoritative edition of Lindley on Partnership, 3rd ed. p. 595: "If one partner knows more about the state of the partnership accounts than another, and concealing what he knows, enters into an agreement with that other, relative to some matter as to which a knowledge of the state of the accounts is material, such agreement will not be allowed to stand by a Court of Equity." So in Lewin on Trusts, 11th ed. pp. 305, 566–7, the duty of a trustee in dealing with his cestui que trust to disclose all material facts is stated to be imperative. Merely putting the selling partner or the cestui que trust upon inquiry is not sufficient: the question is one of disclosure.

The observations of the learned judge in the present case apply as between strangers, not where, as in the case of partners, there is a fiduciary relation. Further, we submit that his view as to the effect of the consent order of February 25, 1901, is erroneous. The effect of a consent order staying all proceedings in an action is not equivalent to that of a judgment pronounced after full discovery. A judgment may operate as an estoppel, but a consent order based on and intended to carry out an agreement between the parties ought to be treated as an agreement which can be set aside on the same grounds as any ordinary agreement: *Wilding* v. *Sanderson* (4); and one of those grounds is non-disclosure by one of two parties to an agreement to the other: *Fox* v. *Mackreth*. (5) Although that was a case of trustee and cestui que trust, yet the obligation to make a full disclosure rests equally upon a partner, and it is now embodied in s. 28 of the Partnership

(1) 1 Ad. & E. 40; 53 R. R. 194.
(2) [1899] 1 Ch. 387, 391.
(3) (1871) L. R. 7 Ex. 26, 27.
(4) [1897] 2 Ch. 550.
(5) (1788–91) 2 W. & T. 7th ed. pp. 709, 716.

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Act, 1890 (53 & 54 Vict. c. 39), which says: "Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives." That must apply to any transaction in which one partner is dealing with another in relation to the partnership assets, and to every part of the transaction. In a transaction between a trustee and his cestui que trust, it is upon the trustee that the onus lies of shewing he has made a full disclosure: it is not sufficient to say that there was or might have been full knowledge on the part of the cestui que trust. The trustee must shew that the cestui que trust had or might have obtained all the knowledge he would have had if he, the trustee, had done his duty. If the trustee has not performed his obligation he cannot maintain the transaction unless he shews that the cestui que trust was in the same position, as regards knowledge, as if he, the trustee, had done his duty: the trustee is bound to give all information that is relevant.

[ROMER L.J. If he has information which he has reason to suppose the other party has not, then, no doubt, it is his duty to disclose it. But is it necessary that, in the case of two active partners, both well acquainted with the business, the partner purchasing the share of the other is obliged to go through the whole details of the business with him? Surely that cannot be so.]

No, if the purchasing partner knows that the other is aware of all the details of the partnership affairs; but if he has reason to think that the other does not know of a particular detail, then it is his duty to ask him if he has that knowledge. The disclosure must be full, not piecemeal, and that applies to the confirmation as well as to the original arrangement.

The sole question is, Has the trustee or partner performed his duty? If not, he cannot retain the benefits conferred upon him by the arrangement.

[COZENS-HARDY L.J. Do the partnership books disclose these investments?]

The learned judge below says in the course of the argument that no one can doubt that complete books were not kept.

Even if proper books had been kept, that is not equivalent to telling us the real state of affairs.

Sir E. Clarke, K.C., P. O. Lawrence, K.C., and *George Lawrence*, for the defendants, the executors of James Law. We submit that the proposition put forward on behalf of the plaintiff goes too far. Whenever the mutual confidence between partners is destroyed, they are at arm's length, and the relation between them of trustee and cestui que trust is at an end. And our contention in the present case is that the evidence shews that this confidence was destroyed before the arrangement of July, 1900.

Once a partner's suspicion is aroused that his co-partner is concealing something from him, he cannot plead non-disclosure, for he is put upon inquiry.

[VAUGHAN WILLIAMS L.J. Do you mean to say that, when the purchasing partner sees that the selling partner is beginning to suspect, he is under no obligation to disclose?]

Here both partners had access to the partnership books. After dissolution, and after the mutual confidence had been destroyed, William, the selling partner, settles. Can he by so doing waive the right to investigate the affairs of the partnership? We say he can. The evidence shews that William deliberately elected to dispense with investigation. All that took place is consistent with there being perfect honesty between the brothers. After William ceased to take part in the management of the business he was treated by his brothers as being no longer entitled to a full share of the profits. This view is consistent with his own conduct: for thirty years he did not ask for any account. He never thought he was entitled to share in the moneys earned by his two brothers at Greetland, beyond the 600*l.* a year which was paid by them to him. A further confirmation of this view is the offer of 10,000*l.* which was made by James. William knew his legal rights, but he was content to take what his brother thought a fair sum—to take such a sum as would produce about the income to which he had been accustomed.

The ground for relief alleged is non-disclosure, without wilful suppression or fraud. It is said that is enough, because

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the relation between James and William was that of trustee and cestui que trust. The right to disclosure could be waived: *Redgrave* v. *Hurd*. (1) A partner may well say to his co-partner, "I do not want to look at the books; I am content to accept for my share in the business such a sum as you consider fair." That is in substance what took place in the present case. The relation between partners differs from that between a trustee and his cestui que trust. Between partners there exists mutual confidence. A partner cannot be compelled to investigate the partnership books. That right may be waived: *Knight* v. *Marjoribanks*. (2) If there can be waiver, there was clearly waiver in the present case.

[VAUGHAN WILLIAMS L.J. referred to *Maddeford* v. *Austwick* (3), where an agreement by a partner to purchase his co-partner's share in the business, at a price which he knew, from accounts in his possession which he concealed from his co-partner, to be inadequate, was set aside.]

In that case it appears from the report (4) that the purchasing partner kept a private book.

But, assuming that there was here deception or wilful suppression, still the bargain was only voidable. The brother William knew something, and, as one of the witnesses said, he "kept it up his sleeve." He does not come to the Court with clean hands. The person who is entitled to avoid a voidable contract must elect whether he will or will not avoid it. When he does elect, he elects once for all. On the dissolution of partnership the fiduciary relation was at an end. If, knowing of a fraud, you elect to stand to your bargain, you cannot afterwards be heard to say you did not know the extent of the fraud: *Campbell* v. *Fleming*. (5) Here William knew the nature of the fraud—namely, concealment of assets.

[VAUGHAN WILLIAMS L.J. Suppose the agreement was confirmed in the belief that the concealment of assets which had up to that time been discovered was the whole concealment?]

(1) (1881) 20 Ch. D. 1.
(2) (1849) 2 Mac. & G. 10.
(3) 1 Sim. 89; 27 R. R. 167.
(4) 1 Sim. 92.
(5) 1 Ad. & E. 40; 53 R. R. 194.

Possibly damages might be recovered for the fraud; but the contract could not afterwards be rescinded: *Clough* v. *London and North Western Ry. Co.* (1); *Campbell* v. *Fleming* (2); *Elsey* v. *Adams.* (3)

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Banner* (4), in which Brett L.J. questioned *Callisher* v. *Bischoffsheim* (5), where it was held that "the compromise of a disputed claim made bonâ fide is a good consideration for a promise, even although it ultimately appears that the claim was wholly unfounded."]

It is submitted that the Court will not set aside an agreement if even a wrong-doer has altered his position on the faith of it. William did not come to the Court until after his brother James had made a will, which, by reason of his death in 1901, could not be revoked. It is a question of election, and if the person who has the right to elect whether he will avoid a sale knows that the purchaser is making arrangements for the disposition of his property on the footing of the validity of the sale, and he then elects to take no steps to set it aside, he cannot afterwards do so.

[COZENS-HARDY L.J. referred to *Miles* v. *New Zealand Alford Estate Co.* (6), in which the Court of Appeal expressed their dissent from what Brett L.J. said in *Ex parte Banner* (4) about *Callisher* v. *Bischoffsheim.* (5)]

Suppose a man says to his creditors, "I know exactly how much I owe you; how much will you take?" and the other then agrees to take a certain sum: could he afterwards set aside the compromise? If the action for fraudulent representation had been fought out the present action could not have been brought; there was a bonâ fide compromise.

Warmington, K.C., *Younger, K.C.*, and *Austen-Cartmell*, for the defendant, the executor of Joseph Law. In 1900 no one could have known exactly the value of a share in the business, and James was at that time in such a condition of physical weakness that he was unable to make any disclosure. There

(1) L. R. 7 Ex. 26.
(2) 1 Ad. & E. 40; 53 R. R. 194.
(3) 2 D. J. & S. 147.
(4) (1881) 17 Ch. D. 480, 490.
(5) (1870) L. R. 5 Q. B. 449.
(6) (1886) 32 Ch. D. 266.

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is no question as to the high standard of honour which is required in dealings between partners. But this applies to a selling partner equally with a purchasing partner. If the selling partner knows of grounds on which he intends afterwards to set aside a sale to his partner and does not disclose them, he cannot afterwards be relieved on equitable grounds from an agreement into which, in breach of his obligations as a partner, he has entered with his co-partner. In the present case it is submitted that the circumstances are such that neither partner is entitled to a purely equitable remedy against the other, though their legal remedies may be unaffected. It is contended that William, with full knowledge of his rights, deliberately elected to ratify the sale. He did so by assigning the bond to trustees, by joining with them in bringing an action on the bond, and by bringing the action for fraudulent representation. After he had been advised by counsel to bring an action for fraudulent representation he was a party (though possibly an unnecessary party) to the action upon the bond, and thus he approbated the contract. It was a deliberate election to affirm the sale: *Scarf* v. *Jardine*. (1) Indeed, the action brought to recover damages for fraudulent representation was an affirmance of the contract for sale, for it was brought on the footing that the state of things constituted by the contract for sale was to continue, and this involved the cesser of the relation of partnership. The issue of the writ in that action was an election to affirm the contract. The parties were then at arm's length, and there was no longer any fiduciary relation between them. When the agreement was entered into for the compromise of that action there was no duty on the part of the defendant to make any disclosure. The argument for the appellant assumes that the partnership relation and its obligations continued, and that it was impossible for a partner who was ignorant of the facts to come to a compromise with his partner who knew the facts. This is not so.

Neville, K.C., in reply. It is argued that there was no duty on the part of James Law to make disclosure. I admit that

(1) (1882) 7 App. Cas. 345.

a trustee is not prohibited from dealing with his cestui que trust; but, if he does so, it must be on certain conditions, (1.) that he deals at arm's length; and (2.) that he makes a full disclosure.

Knight v. *Marjoribanks* (1) is really against the defendants' contention. It was not a case of non-disclosure at all, but of a sale for insufficient consideration. On appeal (2) the decision was affirmed on the ground that it was a case of mortgagee and mortgagor, and that the relation between the parties was not that of trustee and cestui que trust at all.

It is clear from the statement already quoted from Lindley on Partnership, 3rd ed. p. 595, that the rule as to disclosure applies equally between two partners as between trustee and cestui que trust; and there is no trace of any decision in which the proposition laid down by the learned author is in any way controverted or minimised. Perfect good faith must subsist between partners, and one must not take any advantage of the other. Every partner is an agent of the partnership; as such he is bound to give information to his co-partners; and, if purchasing, he must make a full disclosure of all material facts: *Dunne* v. *English*. (3) One partner cannot claim an exclusive right to the knowledge acquired by him in the business. Here the so-called "disclosure" only amounted to the production of the probate valuations, which contained no real information as to the particulars of the assets. Then it is suggested that the books should have been examined; but if they had been, they would not have shewn the investments. It is inconceivable that a man standing in a fiduciary position can come into a Court of Equity and claim to hold a bargain which he has obtained by the non-fulfilment of an obligation which in such a Court his position implies. He cannot furtively obtain an advantage by withholding information which it is his duty to impart. The cases cited on behalf of the defendants have really no application where the equitable relation between the parties does exist. In *Campbell* v. *Fleming* (4) it was, no doubt, held that a purchaser who has

(1) 11 Beav. 322, 344, 351.
(2) 2 Mac. & G. 10, 12, 13.
(3) L. R. 18 Eq. 524, 532, 533.
(4) 1 Ad. & E. 40, 53 R. R. 194.

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discovered that he has been induced to purchase by fraud must, in order to obtain relief, elect, at the time of his discovery, to repudiate the transaction. But the question here is whether the period at which William was bound to elect had ever arisen. We submit not, for there could be no election until full discovery had been made. If the relation between the parties in this case was such as to prohibit the original agreement through non-disclosure, that applied also to the subsidiary agreement. An agreement implied in a consent order in an action has no wider operation than an agreement outside the Court; it has no further binding effect, and can be set aside on similar grounds. Again, one person cannot be forced to elect by another, if that other is under some duty towards him. The real question is, Was the contract created by the compromise obtained through James withholding the information from William? Possibly, if the information had been disclosed the compromise would not have been entered into: the disclosure of a very material fact might have influenced the parties. It is admitted that James was under an obligation, but it was said that William had contracted to take the case out of the obligation. But the answer is that if James obtained a contract through non-disclosure he could not insist upon it. The truth is that William never received such information as would enable him to ascertain what his interest was. If he had known that which James had it in his power to disclose, he never would have taken the 3550*l.*

I ask the Court not to infringe upon the principle stated in Lindley and Lewin and never controverted.

Cur. adv. vult.

1904. Dec. 5. The judgment of the Court (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) was delivered by

COZENS-HARDY L.J. This is an appeal from the judgment of Kekewich J., who dismissed with costs an action seeking to set aside a sale by William Law to James Law of his interest in a partnership business carried on between William and James. The vendor and purchaser are both dead, but their representatives are before the Court.

Now it is clear law that, in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows; and that, unless such information has been furnished, the sale is voidable and may be set aside: see *Maddeford* v. *Austwick*. (1) The original sale of July 2, 1900, by William to James was for 21,000*l*., payable half in cash and half at six months secured by a bond. Now we will assume that this sale could have been set aside by William on the ground that James had not disclosed the existence of partnership assets represented by mortgages and other securities to a very large amount standing in the names of James and his late brother Joseph, who had also been a partner. But shortly after the completion of the sale William undoubtedly ascertained the existence of some of, what we will call, "the suppressed assets." He thereupon consulted counsel; and his case then was, not merely that there had been no proper disclosure by James of the assets in question, but that the sale had been brought about by an actual representation by or on behalf of James that there were no partnership assets beyond those appearing in certain probate valuations, which certainly did not disclose the assets in question. We may here observe that the appellant does not raise any case of misrepresentation before us. He bases his case solely on the ground of non-disclosure, giving rise to a right in equity to a rescission of the contract of sale. The counsel who was consulted advised that an action should be brought for damages for misrepresentation, the measure of damages being one-half of the value of the omitted assets, and counsel added that, as there was some doubt whether all the assets had even then been discovered, it would be well to ask that an account be taken of all further assets belonging to the partnership, and to claim half of their value also. Following this advice, which was given on November 8, 1900, William, on January 22, 1901,

(1) 1 Sim. 89; 27 R. R. 167.

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issued a writ in the King's Bench Division. This action was settled by an agreement dated February 15, 1901, which was embodied in a consent order on February 25, 1901, staying the action. All charges of fraud or fraudulent representations being withdrawn, the sum of 3550*l.* was paid by James to William in discharge of every claim relating to any matter whatsoever between the plaintiff and defendant and in full discharge thereof.

Before this settlement was arrived at, William had ascertained that there were still further partnership assets not disclosed by James, and he surmised and believed that there might be others, though he was not aware of their particulars or amount. Under these circumstances it was, of course, open to William, if he chose, not to insist on his full rights, and in particular not to obtain full disclosure of what the assets consisted, and to come to a settlement or compromise with James on that footing. And this is what he did. What his reasons were for so doing concerned him alone, and it would be idle now to speculate whether he was influenced by fraternal affection, or by an idea that his partnership drawings may have been greater than those of James, or by some other reason. But after the settlement so come to, in our opinion it was not possible for William to reopen the transaction. He deliberately made his election, and by that election he is bound: see *Clough* v. *London and North Western Ry. Co.* (1)

It cannot be sufficient to allege and prove that, if the action had been fought out, the plaintiff would have recovered damages greatly in excess of 3550*l.* No separate and independent fraud is even alleged in bringing about the settlement of February, 1901. William may have been induced to settle largely by reason of representations made by the daughter of James as to her father's health, but these representations were not untrue. He was not induced by any statement or assurance on the part of James or his advisers that there were no other suppressed assets.

But the case against the appellant's claim now to rescind does not even rest solely on what we have just stated. We

(1) L. R. 7 Ex. 34.

have purposely passed over two facts of great importance. William Law, after he had been advised by counsel, assigned the bond to secure the second instalment of 10,500*l.* to trustees; and subsequently, on January 8, 1901, William joined with the trustees in an action on the bond to recover this instalment. Proceedings in this action were stayed on January 18 on payment by James to the trustees of 10,532*l.* 1*s.* 8*d.*, being the balance of all principal moneys and interest, with costs amounting to 3*l.* 5*s.* This was four days before the writ in the action for damages was issued. In point of fact William, with knowledge that the sale might be upset or that damages might be recovered, deliberately postponed proceedings with that view until after he had obtained payment of the balance of the purchase-money, to which he had no title except on the footing that the sale was not to be set aside. It is now too late for William to repudiate the contract of which he has thus deliberately secured the benefits.

It has been strenuously argued that the duty resting on the purchasing partner continued in full force and effect up to and after the settlement of the action, so that James could not rely upon a binding election by William unless and until full disclosure had been made. We know of no authority which supports this proposition, and it seems to us to be contrary to principle. It seems impossible to hold that under such circumstances as existed here William could not, if he chose, come to a binding settlement or compromise or make a binding election not to rescind without full disclosure by James.

In our opinion Kekewich J. was right in the view which he took as to the effect of what was done in January and February, 1901. This appeal must be dismissed with costs.

Solicitors: *Barfield & Barfield; Bower, Cotton & Bower, for Longbotham & Sons, Halifax; Robbins, Billing & Co., for J. L. Garsed, Elland.*

G. I. F. C.

C. A.

1904

Oct. 31;
Nov. 7.

In re WALKER (A LUNATIC SO FOUND).

Lunacy—Lunatic so found—Lucid Interval—Power to dispose of Property—Execution of Deed—Power of Court to direct Trial of Validity or Perpetuation of Testimony—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 123, 341.

When a person has been found lunatic by inquisition, so long as the inquisition has not been superseded, but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property.

The Court will not recognise such a deed even by directing proceedings to be taken to try the question of its validity or to perpetuate testimony as to the state of the lunatic's mind when it was executed, but will treat the deed as entirely null and void.

The difference between the execution of a deed and the execution of a will by a lunatic so found explained.

Ex parte Sir Benjamin Wright, (1683) 1 Vern. 155, considered.

APPEAL by a lunatic, so found by inquisition, from the decision of a Master in Lunacy upon a summons taken out on her behalf by George Thornton, the committee, as the next friend of the lunatic.

The lunatic was so found by inquisition on April 8, 1869. She was an illegitimate daughter of one Benjamin Walker, who died on October 28, 1855. She was absolutely entitled to a sum of 71,718*l.* 19*s.* Consols, which was in court to the credit of the lunacy, and to other personal estate, and was also entitled to a life interest in some real estate.

The summons asked—(1.) that the lunatic might be at liberty to execute a deed-poll and a will disposing of her property, the drafts of which had been prepared according to her instructions; (2.) that upon the execution of such deed-poll she might be at liberty to commence, by Thornton as her next friend, an action in the Chancery Division against the Attorney-General for a declaration that the deed-poll was valid, or that she might be at liberty by such next friend to consent to be joined as a co-plaintiff in an action for the purpose aforesaid by one or more of the beneficiaries under the deed-poll. The summons was dated June 14, 1904, and was served on the Attorney-General.

There was medical evidence that the lunatic was fully competent, so far as her mental condition was concerned, to execute a declaration of trust and a will in the terms of the said drafts, and that she fully understood the effect of them.

On June 28, 1904, the master refused to make any order on paragraph 1 of the summons, and ordered the rest of the summons to stand over generally.

On July 8, 1904, the deed-poll in question was executed by the lunatic. By this deed she purported to declare that she, her executors and administrators, should thenceforth stand possessed of the stocks, funds, and securities mentioned in a schedule to the deed (which were referred to as the "trust fund"), upon trust to pay the income thereof to the settlor during her life, and from and after her death on trust for sale and conversion, and out of the proceeds to pay her debts and funeral and testamentary expenses, and subject thereto to pay various specified sums of money to the persons therein named, most of whom were in fact her relations in blood though not legally so. A power of revocation by deed or will was reserved to the settlor.

There was evidence that at the time when the lunatic executed the deed-poll "she was perfectly capable of executing a disposition of her property either by deed or will, and that she had no insane delusions that influenced her in her intended disposal of her property," and that at that time "she was fully competent so far as her mental condition was concerned to execute the said declaration of trust."

The summons came again before the master on July 25, 1904, when he refused to make any order on it except for payment of costs out of the lunatic's estate.

The lunatic, by Thornton as her next friend, appealed, and by her notice of appeal she asked that the order of the master might be discharged, and that it might be ordered that the lunatic might be at liberty to commence, by Thornton as her next friend, an action in the Chancery Division against one or more of the other beneficiaries under the deed-poll for a declaration that the deed-poll was valid, or that such other directions might be given as might be proper for the institution

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of proceedings for establishing the validity of the deed, or, alternatively, that such directions might be given as might be proper for the institution of proceedings to have the deed-poll set aside.

This notice was served on the Attorney-General.

Oct. 31. *Upjohn, K.C.*, and *MacSwinney*, for the lunatic. It is submitted that the Court should give a direction that an action be brought to establish the validity of the deed-poll. The action might be brought either by the lunatic herself, at the expense of the estate, or by the persons interested under the deed at the expense of the estate. At any rate, leave should be given to bring an action at the expense of the estate to perpetuate testimony, and if necessary the notice of appeal should be amended accordingly. *Ex parte Sir Benjamin Wright* (1) is the oldest authority shewing that the Court will direct an issue to be tried as to the validity of a settlement executed by a lunatic who is alleged to have recovered.

[ROMER L.J. Do you say that a lunatic or his committee may at any time execute a deed, and then come to the Cour and ask that the question of its validity may be tried?]

The case is not put so high as that; the Court is only asked to direct a trial of the question whether the lunatic was of sufficient capacity to execute the deed. It is submitted that it is within the capacity of a lunatic during a lucid interval to execute either a deed or a will: *Hall* v. *Warren* (2), where it was distinctly laid down that "all acts done during a lucid interval" are valid. That law must be the same whether the act is done before or after the inquisition: the only difference is in the burden of proof. If the act—such as the execution of a deed—is done before the inquisition the burden is on the person disputing the deed; if after, then it is on the person taking under the deed.

[*R. J. Parker*, for the Attorney-General. In *Beverley's Case* (3) it was held that all acts done by a lunatic after inquisition are bad.]

(1) 1 Vern. 155. (2) (1804) 9 Ves. 605, 610; 7 R. R. 306.
(3) (1604) 4 Rep. 123 b, 126 b.

That case is not consistent with what has been said in later authorities. There is no authority that a deed executed by a lunatic during a lucid interval is void. There is no authority going beyond this, that the execution affects the burden of proof.

[COZENS-HARDY L.J. In *Beverley's Case* (1) there appears to have been no inquisition.]

But it is distinctly laid down that acts done during a lucid interval are binding. In *Elliot* v. *Ince* (2) Lord Cranworth L.C. said he felt a difficulty in holding that a lunatic could not, during a lucid interval, execute a valid deed when he could make a will.

[ROMER L.J. Looking at s. 120 of the Lunacy Act, 1890, how can this deed have any operation whatever?]

It is not the object of legislation to aggravate the affliction of lunacy by the deprivation of a right to dispose of property: *Banks* v. *Goodfellow* (3), where it was held that "partial unsoundness of mind, not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will."

[ROMER L.J. Can this deed, not having been executed with the sanction of the Court, be recognised by the Court in any way?]

If that is so, it follows that there is no deed. But this deed contains a power of revocation, and by s. 120 of the Lunacy Act, 1890, the Court can authorize the committee of a lunatic's estate to exercise any power vested in the lunatic for his own benefit; consequently the deed-poll enables the Court, in the management and administration of the lunatic's property for her benefit, to exercise the power of revocation on her behalf. It is submitted that it would be reasonable to direct an action to be brought for a declaration that the provisions of the deed are proper and that the deed is valid. If that is not established, the Crown will take the property, instead of those

(1) 4 Rep. 123 b, 126 b. (2) (1857) 7 D. M. & G. 475, 484.
(3) (1870) L. R. 5 Q. B. 549, 566.

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persons for whom this lady was morally bound to provide. She was desirous that the provision she intended to make for her relatives should be put on record in a more binding form than a will, which she had capacity to execute; and there seems no valid reason why, if at the time she was in possession of her mental faculties, she should not be allowed to carry out her wishes by this deed, especially as it does not withdraw her property from the jurisdiction of the Court.

[ROMER L.J. This so-called deed, not having been executed by the committee, ought the Court to recognise it in any way? The Court might require to deal with the property in the lunacy. It seems to me that the deed cannot be regarded as operative in any way.]

The question whether the deed is ipso facto inoperative depends on whether the property still remains vested in the lunatic, or whether it has passed to the committee.

[ROMER L.J. The question is whether during the pendency of the lunacy the lunatic has power to dispose of her property inter vivos.]

It is submitted that during any lucid interval she has, for there is nothing in the Lunacy Act to take the lunatic's property out of her and vest it in the committee. The committee has nothing more than the powers of "management and administration," for, by s. 116 and the following sections, the property itself, until it is disposed of under s. 120, remains in the lunatic. The position is analogous to that of a company in liquidation. Liquidation does not ipso facto deprive the company of its property, for a deed executed under the seal of a company in liquidation may take effect, subject to the power of the liquidator to deal with the property. Why, then, should not this deed take effect subject to the powers of the committee in management and administration? It is possible for a lunatic during a lucid interval to make a will: why should it be impossible for him to execute a deed? There seems to be no good reason why the Court should not assist in ascertaining the facts in connection with the execution of a deed by directing an action to be brought to

perpetuate testimony, just as it has done with regard to the execution of a will: *In re Tayleur* (1), where the Court refused to follow *Sackvill* v. *Ayleworth* (2), which had been cited in argument.

[ROMER L.J. You are asking us to give a qualified sanction to the deed.]

The question of its validity might be left open, and the Court might direct an action to be brought to perpetuate testimony with reference to the execution of the deed. In *In re Stoer* (3) the Court of Appeal thought that a settlement of a lunatic's property should be made, in order that proceedings might be instituted to perpetuate testimony as to the alleged illegitimacy of a child of the lunatic. In the alternative, it is now asked that proceedings may be directed to be taken to set aside this deed. It is submitted that the deed is not wholly inoperative, and that effect should be given to the lunatic's desire that her property should go to her relatives and not, in the circumstances, lapse to the Crown.

VAUGHAN WILLIAMS L.J. Let the case stand over till November 7, to enable us to examine the record in *Ex parte Sir Benjamin Wright.* (4)

(1) (1871) L. R. 6 Ch. 416.

(2) (1682) 1 Vern. 105.

(3) (1884) 9 P. D. 120.

(4) 1 Vern. 155. In accordance with the wish thus expressed by the Court, the record in *Ex parte Sir Benjamin Wright* was examined at the Record Office.

The following is a copy of notes made by the Chief Clerk in Lunacy of the result of the search at the Record Office :—

"23rd Sept., 33 Car. 2 (1681). Commission de lunatico inquirendo.

"3rd Oct., 33 Car. 2 (1681). Inquisition finding him a lunatic for one month last past with lucid intervals. (His estates in Essex mentioned and son Nathan aged 20 years and upwards.)

"29th March, 35 Car. 2 (1683). Deed made between Sir Benjamin Wright of the one part and Nathan Wright his only son and heir-apparent of the other part, whereby Sir Benjamin conveyed the manor of Wokinden Episcopi and other real estate in Essex to Nathan Wright, who covenanted to convey the same to trustees therein named, upon trust to pay 400*l.* a year during the joint lives of Sir Benjamin and Dame Jane his wife to such person as Dame Jane alone without her husband should appoint by writing, and if Sir Benjamin survived his wife to pay the annuity to him and to permit Nathan Wright to receive the residue of the rents.

"2nd April, 35 Car. 2. Deed

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Nov. 7. *Sir R. B. Finlay, A.-G.*, and *R. J. Parker*, for the Crown. The true conclusion from the report of *Ex parte Sir Benjamin Wright* (1) as explained by the record is that the proceedings which the Court directed or suggested should be taken were for the purpose of determining, not whether the lunatic had executed the settlement during a lucid interval, but whether he had recovered his sanity, and the further

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acknowledged in Chancery by Sir Benjamin Wright.

"25th April, 35 Car. 2 (1683). Deed enrolled.

"16th April, 35 Car. 2 (1683), Hilary Term. Two minutes A and B of Mr. Registrar Devenish not identical in terms.

"Easter Term, 35 Car. 2 (1683). Fine levied.

Between the Trustees of the deed of 29th March 1683, Plaintiffs

and

Sir Benjamin Wright, Dame Jane Wright and Nathan Wright, Deforciants.

"Trinity Term, 35 Car. 2 (1683). Recovery suffered. Nathaniel Wright Armi. voc. qui voc. Benj. Wright bar.

"The further direction referred to in minute A has not been discovered, nor can any order drawn up on that minute or any subsequent be found. No trace of the plea of the Attorney-General has been discovered, or any entry of the appointment of a committee, or of the taking off the file or vacation of the inquisition."

The following are copies of the registrar's minutes A and B, supplied from the Record Office:—

[A.]

"REGISTRARS' MINUTE BOOK (CHANCERY).

Mr. Registrar Devenish. Vol. 373.

Lord Keeper

Lunc. 16th die April 1683.

S^r Benjami Wright. Mr. North would have a reinspeccon of S^r Ben. hee is now better and there is a settlem^t to bee made on the sonn.

M^r Attorney Ge^eall the King doth only take care and is not otherwyse concerned and there must bee a method of trying it.

Cur. Let there bee a plea put in to the inquisition and M^r Attorny Ge^eall to joine yssue in it and let it bee tryed as soon as may be and then will give further direction."

[B.]

"REGISTRARS' MINUTE BOOK (CHANCERY).

Mr. Registrar Devenish. Vol. 388.

Lord Keeper

Lunc. 16 Aprilis 1683.

S^r Ben Wright. Mr. North this comes upon the point of lunacy wee pray that it may be put in some way that may plead to the Inquisicio M^r Attorney. Cur plead to the Inquisicio lett M^r Attorney joyne issue and if any settlement to be made the fine and recovery shall be in open Co^rt in the Co^rt of Com pleas."

(1) 1 Vern. 155.

directions which the Court was to give would have been to supersede the commission. So long as the commission or inquisition remained in force the execution of a deed by the lunatic would be inconsistent with the rights and duties of the Crown. In *Mansfield's Case* (1) the fine was levied by the idiot before he was so found by inquisition. In *Ex parte Sir Benjamin Wright* (2) it now appears that the deed had been actually executed by the lunatic, and the parties thought there might be a doubt as to its validity, and application was made to the Court for liberty to execute the deed.

[VAUGHAN WILLIAMS L.J. The object was to ascertain whether the deed conferred a good title. The Crown has no title to the property of the lunatic. On the inquisition there is only a finding of the incapacity of the lunatic, and then the title of the Crown to control his property arises.]

On the finding by inquisition the right of the Crown becomes of record.

Beverley's Case (3) shews that if a lunatic so found were sued upon a bond made when he was non compos the Court would intervene to stop the action, though if a fine be in fact levied or a recovery suffered by a lunatic, it cannot be avoided by any one, because it is a matter of record. In *Ex parte Sir Benjamin Wright* (2) the Court refused to allow a lunatic to execute a deed of settlement, and said, "If you want to make a settlement do it by means of a fine." In that proceeding the Crown would plead the inquisition and the lunatic would plead that he was no longer insane. The inquisition and the title of the Crown under it would then be superseded, but so as not to invalidate anything which had been done under it in the meantime. The fine would not be levied till after the supersedeas. The forms of the ancient writs of inquiry, under the Statutes of Prerogative, 17 Edw. 2, stat. 1, caps. 9, 10, are given in Collinson on Lunacy (1812), vol. i. pp. 117 et seq.

[VAUGHAN WILLIAMS L.J. I know of no case in which the question of the validity of a deed, executed by a man after he has been found lunatic by inquisition, has been raised after his death.

(1) (1614) 12 Rep. 123. (2) 1 Vern. 155. (3) 4 Rep. 123 b.

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Upjohn, K.C., admitted that in all the reported cases except *Ex parte Sir Benjamin Wright* (1) the deed had been executed before inquisition.

ROMER L.J. referred to *Elliot* v. *Ince*. (2) The judgment of Lord Cranworth L.C. in that case is instructive. Some of his observations appear to cover *Ex parte Sir Benjamin Wright*. (1)]

After office found the status of the lunatic is altered and the prerogative of the Crown intervenes. If the deed-poll is valid the lady is in the position of a trustee of her property. As a lunatic she would be an unfit person to act as a trustee, and any beneficiary would be entitled to ask for the appointment of a new trustee, and so the property would be taken out of the custody of the Crown.

[VAUGHAN WILLIAMS L.J. There is no objection to the lunatic disposing of her property by will; the ultimate effect of this deed would be the same as that of a disposition by will.]

A specific gift made by a will might be adeemed. A deed would conflict with the control of the Crown and with the authority vested in the Court by s. 120 of the Lunacy Act, 1890. It is submitted that after the finding by inquisition the lunatic cannot, so long as that finding stands, execute a deed. If the deed is made revocable the lady might change her mind, and many such applications as this might be made to the Court. The question of the validity of the deed could not be decided, for the proper parties could not be brought before the Court. It would be for the benefit of the lunatic herself that the deed should be revoked and that she should execute a will. She might re-execute a will from time to time, and in that way preserve evidence of her mental capacity.

MacSwinney, in reply. The last suggestion is an impracticable one. Why should not the lady during a lucid interval do what she pleases with her property, provided that she does not interfere with the prerogative of the Crown and the rights of the committee? The reports of the Chancery visitors in a lunacy are confidential and an order will not be made for their production: *Roe* v. *Nix*. (3) Many of the propositions

(1) 1 Vern. 155. (2) 7 D. M. & G. 475. (3) [1893] P. 55.

laid down in *Beverley's Case* (1) are mere obiter dicta. What was said by the Lord Chancellor in *Elliot* v. *Ince* (2) is really in favour of the present application. Lord Cranworth evidently thought that a deed and a will stood for this purpose on the same footing.

[VAUGHAN WILLIAMS L.J. It may be that neither a deed nor a will is void by reason of the incapacity. But a deed may be void by reason of the finding of lunacy—i.e., by reason of the rights of the Crown under that finding.]

The Statutes of Prerogative only deal distinctly with the rents and profits of the lunatic's real estate.

[COZENS-HARDY L.J. Sect. 120 of the Lunacy Act, 1890, applies to all property of the lunatic. In *Beverley's Case* (3) Lord Coke says that "the King shall have the protection of the goods and chattels of an idiot, as well as of his lands," and that the same law applies if a man who was of sound memory becomes non compos mentis, and is so found by office at the King's suit.]

Ex parte Sir Benjamin Wright (4) as reported is directly in favour of the present application, and the record now produced confirms this view.

This deed-poll in no way interferes with the rights of the Crown, which has only the control and management of the property of the lunatic during the lunacy.

It is submitted that a satisfactory form of action to determine the validity of the deed-poll would be this: an action by the beneficiaries against the lunatic to establish the deed; the action could be defended by the committee on behalf of the lunatic, and the official solicitor could appear for her. The committee could plead that the lady was of unsound mind when she executed the deed.

VAUGHAN WILLIAMS L.J., after stating the application to the master, continued:—The master refused that application, and we have to consider whether he was right in so doing. This lady was found a lunatic by inquisition as long ago as

(1) 4 Rep. 123 b.
(2) 7 D. M. & G. 489.
(3) 4 Rep. 126 b, 127 a.
(4) 1 Vern. 155.

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1869. We are told that she was not born in wedlock, and is therefore nullius filia and can have no kin. We were also told by Mr. Upjohn that there have been various examinations of this lady, both by the Lord Chancellor's visitors, and by other doctors qualified to form an opinion as to her mental condition, and that their view was that generally, apart from the unfortunate delusions which resulted, and I must take it properly resulted, in her being found a lunatic, she is of such mental capacity that she could generally be expected to deal with her property in a reasonable and sensible manner. We are told that the object of the deed was to make a reasonable provision for the children and other relations of her mother and of her father—a provision suitable for their condition in life. And, there being a very large sum of money to which this lady is entitled, there would, even after making this provision for those who are not her relations in law, whatever they may be in blood, be a considerable surplus, and I gather that this deed disposed of the surplus by giving it to charitable institutions.

Under these circumstances we are asked to say that the master was wrong in refusing this application, which was to authorize proceedings to be taken for the purpose (to put it shortly) of testing the validity of this deed thus executed by the lady. I should have mentioned that the deed gives nothing away during her lifetime, but only disposes of her estate after retaining for herself the benefit of it during the whole of her life.

Now the question is whether we ought to recognise this deed in any way—to recognise it sufficiently to justify us in making an order by means of which the validity of the deed and the present mental capacity of the lady can be immediately determined. We have come to the conclusion that we ought not to do this. We think we ought to treat the deed as being absolutely void and of no effect whatsoever. It was however suggested by Mr. Upjohn that, even although we might not think we had jurisdiction to make such an order as that which is asked by the notice of appeal, yet we might make an order for the perpetuation of testimony. We are of opinion that, if we take (as we do) the view that the deed is absolutely void,

it follows (and I need not go into the authorities upon it) that we ought not to make an order for the perpetuation of testimony.

In order to judge whether we ought to recognise the deed at all, we must consider what is the position of the Crown with reference to lunatics so found. The Lunacy Act of 1890 makes many provisions with regard to persons who are not lunatics so found, but who are incapable of managing themselves and their property. But the present case is that of a lunatic so found, and I propose to deal only with such a case. But it must not be supposed that by so doing I intend to limit my reasoning entirely to such a case. It may well be that, looking at the provisions of the Act of 1890 with regard to persons not found lunatic, but who have been made the subject of an order under this Act, the same reasoning might bring the Court to the same conclusion with reference to those persons. I say nothing about that one way or the other. Now s. 120, which deals with powers exercisable by a committee under the order of the judge, provides that, "The judge may, by order, authorise and direct the committee of the estate of a lunatic to do all or any of the following things (inter alia)—(*a*) Sell any property belonging to the lunatic," and, by s. 341, "property" is defined as "real and personal property, whether in possession, reversion, remainder, contingency or expectancy, and any estate or interest, and any undivided share therein." As regards the relation of the Crown to lunatics, it may be taken generally that the Crown is the custodian of the property of a lunatic so found, and it may, I think, be said in general terms that the property passes out of the control of the lunatic and comes under that of the Crown only in order that the lunatic may have that protection from the Crown to which he is entitled. Therefore, when we have to consider the question whether this deed is void, we cannot dispose of it by saying that that which was the property of the lunatic has ceased to be her property and has become the property of the Crown. But during the whole period of history in which we have legal reports, the Crown has possessed the prerogative (although it was not always defined as

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it has been later by statute) of dealing with and controlling the property of a lunatic. It is quite sufficient, as it seems to me, to dispose of the present case to say that the Crown has that control (as distinguished from property) of the real and personal estate of a lunatic, because the moment one sees that the committee, as representing the Crown, has the rights and powers mentioned in s. 120 of the Act of 1890, it is perfectly plain that they cannot be effectively exercised by the Crown in the interest and for the benefit of the lunatic, if during the same period some one else is to have the control of the property. In that event there would be a conflict of control which would be entirely inconsistent with the exercise by the committee of those rights of the Crown which have been delegated to him.

As against this view it is said that if a lunatic is of sufficient mental capacity to do so he can execute a will, and that after his death the will can be proved, if the Court to which the application for probate is made is of opinion that the testator at the time when he executed the will was of testamentary capacity and understood what he was doing. Of that there can be no doubt.

Then it is said, if a lunatic has this capacity to make a will which can be proved after his death, why should he not also have power to execute a deed which on the face of it is only to take effect upon his death, and creates only reversionary interests arising after the death of the lunatic? It does certainly seem at first sight a little inconsistent that the law should recognise the capacity of the lunatic to make a will, and should refuse to recognise his capacity to execute a deed which is intended to take effect only after his death. But the answer to this is, that the beneficiaries under a will have no interest and no locus standi whatever until after the death of the testator. The will is ambulatory and may be revoked by the maker of it at any time before his death, and the result is that the execution of a will gives no immediate interest to the beneficiaries either in possession or in reversion. The will is of no effect until the death of the maker of it, and the consequence is that the making of it does not give rise to any conflict of control.

The beneficiaries under such a will cannot, when orders are being made in respect of the lunatic's property, come forward and claim to interfere in any way, whereas those claiming under a deed could successfully insist upon a locus standi to be heard, and immediately thereupon a conflict of jurisdiction would arise.

It is said that this deed is in such a form that that conflict could not arise. I do not think we ought to look at the deed. But it is suggested hypothetically that it might be in such a form as in substance to make any rights given by it subject to the rights of the Crown. But even that would not take away the locus standi of those claiming under the deed to be heard. They would have a voice, for instance, in the appointment of a trustee, if the grantor had made herself the trustee by the terms of the deed. Under these circumstances it seems to me that the argument, which is based upon the law being such that effect will be given to a lunatic's will, if it turns out that he executed it during a lucid interval, he being of sufficient testamentary capacity, does not carry us to the conclusion that because a lunatic has such a testamentary power he ought also to be allowed to deal with his property by a deed inter vivos.

I do not think I need say much more with respect to the present application than that we ought not to recognise this deed in any way. The Court ought to treat the deed as entirely void, on the plain and simple ground that its execution is inconsistent with the control which the Crown has the right and the duty of exercising over the property of a lunatic, and that is a sufficient reason for the conclusion at which we have arrived.

But then it is said that, although the deed is inconsistent with the powers and duties which the Crown has always exercised in reference to lunatics—powers and duties which have been recognised by the Legislature in the Lunacy Act, 1890—there is authority which shews that, notwithstanding the fact that the Crown has that control, custody, and power, notwithstanding the fact that the Crown has the right to exercise, and has constantly exercised, the power of selling and disposing of

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the property, both real and personal, of a lunatic for his benefit, yet the Court ought to recognise such a deed, however inconsistent it may be with that power of the Crown. It is said that the authorities bind us to do so. I do not propose to go through the authorities at any length, because to do so would be a waste of time. I may say generally of *Beverley's Case* (1) that that passage in it which speaks of lunatics as distinguished from idiots does not, I think, favour the argument of the appellant, but rather favours the proposition of the Attorney-General that such a deed is absolutely void. But it is said that, although *Beverley's Case* (1) may be against the appellant, *Ex parte Sir Benjamin Wright* (2) is an authority that if a lunatic so found does between the date of the inquisition and his death execute a deed, the Court ought, and is indeed bound, to make such an order as will result in the question of his sanity at the moment of the execution of the document being tried and disposed of and the decision placed on record in some shape. One would be glad to arrive at a conclusion which might mitigate the sorrows incident to the position of a lunatic so found. No one can doubt that many a lunatic properly so found chafes very much under the restrictions which prevent him from dealing with his property and doing other acts which his mere mental capacity would probably suffice to enable him to do, and to do reasonably. But, if it is necessary for the protection of lunatics generally that they should be debarred from the exercise of such powers, one must, however regretfully, refuse to accord them to lunatics who are under the protection of the Crown. We should have been glad if we could have found a means of according such powers consistently with the protection of lunatics, but we have not been able to find any such means. And when we carefully examine *Ex parte Sir Benjamin Wright* (2), I do not think we should be justified in treating it as an authority for the proposition that the Court ought to decide upon the validity of a deed inter vivos executed by a lunatic so found while the inquisition stands unvacated or unsuperseded. The report of *Ex parte Sir Benjamin Wright* (2) is a very short one. [His Lordship read the report, and continued :—]

(1) 4 Rep. 123 b. (2) 1 Vern. 155.

We have had an opportunity of examining a copy of the original record supplied to us from the Record Office. The Court requested the Record Office to supply us with copies of all documents which might throw any light upon the case, so that we might understand what was really the meaning of the order there made. I desire to take this opportunity of saying with what extreme care and how quickly the officials of the Record Office have made the necessary searches and have provided us with every document which throws any light upon the matter. These documents are now before us (1), and by their aid we can follow pretty well (I do not say with absolute certainty) what was done in the case. It is plain from the report (2) that it is consistent with either of two possibilities. An issue was to be tried of some sort. What was that issue? It may have been an issue whether the soundness of mind of Sir Benjamin Wright had been restored, so that the inquisition ought to be vacated or superseded; or it may have been an issue, as it is said on behalf of the appellant that it was, to try the question of the capacity of Sir Benjamin Wright to execute the particular settlement. It may have been intended to direct an issue to try that question, which was consistent with the continuance of the inquisition finding Sir Benjamin Wright a lunatic. When we look at these documents we find that the commission was issued in 1681. The inquisition finding Sir Benjamin Wright a lunatic is dated October 3, 1681, and it runs thus: "Inquisition finding him a lunatic for one month last past, with lucid intervals." Now it is possible, so far as the report in Vernon is concerned, that the object of the issue was to try whether the deed was executed in such a lucid interval. Then on March 29, 1683, the settlement was executed by Sir Benjamin Wright, and it conveyed certain real estate to Nathan Wright, who covenanted to convey the same to trustees upon certain trusts; I do not think it is material to mention the trusts. That being so, the deed was acknowledged on April 2, 1683, and was enrolled on April 25. On April 16, in Hilary Term, two minutes (marked respectively A and B) were made by Mr. Registrar Devenish. I do not think there

(1) Vide n. (4) ante, p. 165. (2) 1 Vern. 155.

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is much, if any, difference in their effect. [His Lordship read the two minutes, and continued :—]

In minute A it is stated that Mr. Attorney-General said "there must bee a method of trying it." This may mean either the question of a lucid interval (to put it shortly) or the question of the general sanity of Sir Benjamin. Then it goes on: "By the Court, Let there bee a plea put in to the inquisition and Mr. Attorney-General to joine yssue in it and let it bee tryed as soon as may be and then will give further direction." It appears that no record of a "further direction" after the trial of the issue can be found in the Record Office. Minute B is of the same date, and is obviously a minute of the same order. I gather that the issue was to be tried in the Court of Common Pleas. There is nothing to shew whether the issue was upon what I may call for shortness the "lucid interval point." The objection which occurred to me, that the question as to the state of mind generally of the lunatic could not be tried in the Court of Common Pleas in proceedings of fine and recovery, was met by Mr. Parker by saying that as a result of those proceedings there would be a finding of record, and it might be that that finding would go to the general condition of the mind of the lunatic at that time, and that, if the Attorney-General was present and that state of mind was put on record, it would be sufficient to enable the Crown and its officers to deal with the Crown's office and title or whatever it may be called, and if that finding of record in the Common Pleas was favourable to the sanity of Sir Benjamin Wright then the Crown could thereupon order the inquisition to be vacated or superseded. I am not prepared to say that that is not a sound answer. It is not of course the same thing as the original commission upon which the finding of lunacy was based. There would have been no second inquisition with a finding thereon justifying the superseding or vacating of the first inquisition. But still there would or might be in the proceedings in the Common Pleas a finding of record sufficient to determine the state of mind of the lunatic, and to enable the original inquisition to be vacated or superseded at the instance of the Crown. It is, however, sufficient to say that,

now we have all the particulars which we have been able to obtain, it cannot be said that *Ex parte Sir Benjamin Wright* (1) is a clear authority for the proposition that, if a deed is executed by a lunatic so found, the Court ought to recognise that deed sufficiently for the purpose of determining and putting on record either a decision of the validity of the deed, or a finding as to the capacity of the lunatic to execute it at the date of the deed. Under these circumstances I can only say that in this state of the authorities we are bound to refuse to recognise this deed, even for the purpose of testing its validity, to treat it as void, and to refuse to make any order for the trial of its validity or for the perpetuation of testimony in view of any future action. Therefore the appeal will be dismissed.

ROMER L.J. I also think that we ought not to accede to this application. It is admitted on behalf of the appellant that the Court cannot be asked to approve the provisions of the so-called deed-poll, or to sanction the execution of that deed or a similar deed by the committee on behalf of the lunatic. But it is said that the Court ought to recognise the deed to the extent of authorizing some proceedings by which either evidence could be preserved or an issue found in favour of the lunatic having at the date of the execution of the deed either testamentary power or some power of dealing with her property. I cannot see my way to accede to that suggestion. The lady is a lunatic so found, and a committee of her estate has been appointed. This application is in my opinion a mere experiment, and, had there been any real ground for it, I think some authority would have been cited to justify it.

In my view there are two fatal objections to the application. In the first place, having regard to the rights of the Crown under the inquisition and the provisions of s. 120 of the Lunacy Act, 1890, it is I think clear that this so-called deed, purporting to bind the lady's property as from its date, the lunacy being still pending, is wholly inoperative and void and ought not to be recognised by us in any way. In the second place, I cannot see how any practicable or proper proceedings could be

(1) 1 Vern. 155.

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sanctioned by us which would have the effect desired by the applicant. I can see how some collusive proceedings could be taken; but the Court would certainly not sanction proceedings of that kind. On these grounds I think the application must fail.

I will only add a word with regard to *Ex parte Sir Benjamin Wright.* (1) That case is not satisfactorily reported, and it is not easy to follow it. But, at any rate, we cannot in my opinion treat it as an authority which justifies the present application. I cannot help thinking that the case only shews that the Court in 1683 adopted the course which it did adopt in order in effect to allow an issue to be tried whether the lunatic had wholly ceased to be such, and ought therefore no longer to be treated as a lunatic; in other words, as a method of obtaining a supersedeas of the inquisition. Fine and recovery being hypothetical proceedings, and of record, it appears to have been considered that a finding of sanity in such proceedings might have had the desired effect of superseding the finding on the inquisition, which is also of record, and could of course be set aside only by matter of equal force. In the present case it is open to the lunatic to take the recognised proceeding to get rid of the inquisition by way of supersedeas, if she thinks fit to do so. If she succeeded in that proceeding, then of course she would be able to deal with her property in any way she might think fit. She has not, however, taken that proceeding, nor indeed, as I gather, is it considered that she could do so successfully. At any rate she has not done so, and I cannot think that, the lunacy remaining as it does in full force, we ought in any way or on any ground to accede to the present application.

COZENS-HARDY L.J. I am of the same opinion. We are, I think, bound to treat the deed which has been executed by this lady as absolutely void and of no effect. I can see no answer to the argument which Mr. Parker presented to us founded on *Beverley's Case* (2), which seems to me to be a clear authority. There Lord Coke, after dealing with the case

(1) 1 Vern. 155. (2) 4 Rep. 123 b.

of an idiot from birth, and pointing out that his alienation is absolutely void both of lands and of goods and chattels, proceeds to say there is no difference in the case of a lunatic after office found. Lord Coke says (1): "And therefore after the office found thereof, the alienation, gift, &c., of him who is non compos mentis are in equal case with the alienation or gift of an idiot," and adds (2): "So that it appears that in judgment of law, fatuus et idiota include as well non compos mentis, as idiota a nativitate, and therefore they are in the same case, as to the alienation of their lands and tenements, goods and chattels."

Is there, then, any authority to the contrary? *Ex parte Sir Benjamin Wright* (3), to which we have devoted a good deal of attention, seems to me to amount only to a suggestion by the Lord Keeper of a mode of deciding the issue whether Sir Benjamin Wright was or was not of sound mind—whether, in short, in some subsequent proceedings a supersedeas ought to be granted. Our attention has been called to various authorities in which the Courts have directed an issue whether a deed executed by a person of unsound mind was or was not valid. But, when those cases are examined, it will be found that in every one of them the deed in question had been executed before, not after, inquisition found. That being so, there was not that conflict of control which in point of principle enables us to decide the present case. It cannot be right that the Crown, or the committee who represents the Crown, should have the control and management of the lunatic's estate, and at the same time that she should have power to dispose of her estate as she thinks fit. In my opinion this deed ought to be treated as absolutely null and void.

Solicitors: *Ridsdale & Son*, for *J. H. Simpson, Dewsbury; Solicitor to the Treasury.*

(1) 4 Rep. 127 a. (2) 4 Rep. 127 b.
(3) 1 Vern. 155.

W. L. C.

C. A.
1904
KEKEWICH J.
Oct. 28.
C. A.
Nov. 16, 17.

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[1904 J. 1592.]

Public Elementary School—Non-provided School—Trust Deed—Old Managing Body—Master—Contract—Dismissal—New Managing Body—Foundation Managers, Action against—"Appointed Day," Notice of Dismissal given before but expiring after—Local Education Authority—Consent to Dismissal—Parties—Misjoinder—Education Act, 1902 (2 *Edw.* 7, c. 42), *s.* 7, *sub-s.* 1 (*c*).

Sect. 7, sub-s. 1 (*c*), of the Education Act, 1902, which requires the consent of the local education authority to the dismissal of a teacher in a non-provided public elementary school, has no application to a case where, a teacher having been appointed by the old managing body of such a school, they, before the Act comes into operation on "the appointed day" under s. 27, have given him three months' notice in writing terminating his engagement pursuant to the terms of their contract with him, and that period expires after the appointed day.

A plaintiff who, prior to the Education Act, 1902, has entered into a contract with the old managing body of a non-provided public elementary school cannot maintain an action to enforce his contract against the new managing body appointed under s. 6, sub-s. 2, of the Act, where that new managing body does not include the original contracting parties.

Decision of Kekewich J. affirmed.

On May 31, 1875, a piece of land in the village and parish of Gwaenysgor, Flintshire, was, under the authority of the School Sites Act, 1841 (4 & 5 Vict. c. 38), and the School Sites Act, 1844 (7 & 8 Vict. c. 37), conveyed unto and to the use of the minister and churchwardens of the parish, and their successors, for the purposes of the said Acts, upon trust for the erection of a National School: and it was provided that the management of the school and the appointment and dismissal of the school teachers should be vested in a committee consisting of the incumbent for the time being, his licensed curate, if the incumbent should appoint him a member, and of the churchwardens, and three other persons being members of the Established Church and subscribers to the funds of the school of not less than 10*s.* annually; and that any vacancy on the committee should be filled up by the appointment of a

subscriber qualified as aforesaid, such appointment to be vested in the incumbent for the time being.

The trust deed was in the form contained in s. 10 of the Act of 1841 as varied by s. 4 of the Act of 1844.

On July 3, 1899, the plaintiff was appointed head master of the school by the managing body, which consisted only of the then rector and two churchwardens of the parish. There appeared to be no written contract in existence relating to the appointment, but the plaintiff stated by affidavit that the terms of his appointment were that he was to receive a certain salary, and that his engagement should be determinable on three months' notice by either party.

On May 6, 1904, the then managers, consisting of the rector and the two churchwardens, who were not the same managers as in 1899, gave the plaintiff notice in writing that they would not require his services after August 9, 1904. The notice was not given on any grounds connected with the religious instruction in the school.

On July 1, 1904, before the expiration of that notice, the Elementary Education Act, 1902, came into operation in Flintshire, that being the "appointed day" under s. 27, whereupon the county council became the local education authority and as such liable for the maintenance of the school.

Under s. 6, sub-s. 2, and s. 11 of that Act the managing body consisted of (*a*) the "foundation managers," being the rector and churchwardens of the parish, together with a fourth person appointed under the trust deed, and (*b*) two other persons appointed by the public authorities.

The plaintiff then applied to the county education committee, that the county council, as the local education authority, should not give its consent to his dismissal, as was said to be required by s. 7, sub-s. 1 (*c*), of the Act (1), whereupon an

(1) Sect. 7, sub-s. 1, provides that "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:—

"... . (*c*) The consent of the local

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inquiry into the circumstances was held by a committee of the county council, with the result that the committee passed a resolution recommending the local education authority not to give their statutory consent to the dismissal of the plaintiff.

The foundation managers did not attend the inquiry as they considered that the dismissal was not theirs, and that any waiver of it would have constituted a new appointment, and that consequently the case was not one requiring the consent of the local education authority.

As the four "foundation managers" were taking steps to appoint a new master in the place of the plaintiff, he, on August 24, 1904, issued the writ in this action against those four persons, claiming an injunction to restrain them from preventing him from exercising his duty as master, and also a declaration that the plaintiff was master until his engagement had been duly terminated by a properly constituted authority.

On August 31 the plaintiff moved for an interim injunction in the above terms before Bigham J. as Vacation Judge, who made an interim order until over the second motion day in Michaelmas sittings.

The motion came before Kekewich J. on October 28, 1904.

As the two managers appointed by the county council had taken no part in the proceedings complained of, they were not added as defendants to the action.

Low, *K.C.*, and *H. Lynn*, for the plaintiff, in support of the motion, referred to the Education Act, 1902 (2 Edw. 7, c. 42), s. 6, sub-ss. 1, 2, and s. 7, sub-ss. 1, 7, and contended that at the time when the notice took effect the county council were the proper authority to deal with the matter. In the case of a notice worded as this one was worded the period of time to be regarded was the time when the notice took effect, and before that time arrived the jurisdiction of the county council had

education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school."

intervened. From and after the appointed day the managers had no power to get rid of the master except with the consent of the county council as provided for by s. 7, sub-s. 1 (*c*). If the managers in May had said to the master "We now dismiss you" there would have been an end of the matter; but the notice they gave implied that they would require his services until August 9. It was merely an expression of intention to determine the contract.

P. O. Lawrence, K.C., and *A. B. Nutter*, for the defendants, were not called upon to argue.

KEKEWICH J. Notwithstanding the argument that has been addressed to me, and notwithstanding that Bigham J. apparently thought the point deserved more consideration than he could give to it in the Vacation sitting, I cannot see any difficulty in the case at all. The plaintiff was appointed head teacher of the school by the then authority, those in whom the management of the school was for the time vested, and according to his own statement that was on the terms that the engagement should be determinable by three months' notice. There may have been a written agreement, although it is not produced, providing for that; there may have been a verbal agreement that it should be so determinable, or there may only have been a general acceptance of some rule that a person occupying that position is entitled to three months' notice; but, at any rate, that is his own statement by which he is prepared to stand. The school being still under the same course of management, the managers give through Mr. Hughes, one of the defendants who is the rector, notice on May 6 to the plaintiff, saying that they "will not require your services as master of the aforesaid school after the 9th of August, 1904." It is not suggested that that was not a perfectly good notice, under the agreement to which the plaintiff refers, determining the engagement at the end of three months with a day or two to spare. If nothing else had happened, there could be no question that at that time the plaintiff would have been obliged to give up his position; but somewhat later the school came under the county council by virtue of the Act

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of 1902. Under that Act different schools may come under the county council at different times. It is for the authorities to fix a day called the appointed day, and that appointed day fell between the day when the notice was given and the day when the notice expired. Why was the notice not good as against the county council coming in on the appointed day and taking up this school? That is a question I see no reason at all for answering otherwise than by saying the notice was perfectly good, and that the engagement was determined. I cannot myself see any difference between that and an engagement, say, to purchase so many chairs and tables, or so much coals, or to do some repairs—repairs perhaps had not better be brought in—but anything in the way of pure maintenance of the school; there might have been an engagement for some person to sweep out the school on Saturday or oftener. Why is not that determinable by the manager at the time notwithstanding that the appointed day is come when some other authority is coming in? It seems to me the county council necessarily take the school over subject to proper contracts, whatever they are. Contracts of service and contracts determining service are equally binding on the successors to the old managers. If that is the right view, there is no reason why the county council should, in their character of the educational authority, have acceded to the plaintiff's suggestion to make inquiry whether he was to be continued or not. What they have to consider is what the appointment is to be when the place is vacant, which according to my judgment it has been for some time, and is at the present time. Their consent is required in a limited way, but still their consent is required, and the appointment is vested, subject to that consent, in the foundation managers with the addition of the managers appointed according to the Act, that is to say, by the educational authority. In this case I think the county council themselves appoint both, and there is no borough council to appoint one of them. The place is vacant. It is now a question of a new appointment, not whether an old appointment should be renewed or regarded as not having come to an end. Then it was put ingeniously by Mr. Low that giving the master

notice that his services were not required after a certain date was an intimation that his services would be required until that day, and that therefore he was continued in the service until after the appointed day, that is to say, until after the county council take possession, if I may use a rather inappropriate phrase. I agree; but nothing follows from that. The only result is this. He is engaged until August 9. I follow the argument to that extent—not August 9 and afterwards—but he is engaged for a limited time. At the end of the limited time the necessity of appointment arises; that appointment must be made according to the terms of the Act. To my mind, these few observations entirely dispose of the case.

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C. C. M. D.

The plaintiff appealed. The appeal was heard on November 16, 17, 1904.

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Low, *K.C.*, and *H. Lynn*, for the appellant. After "the appointed day" the notice to leave required something further before it could become effective, namely, the consent of the local education authority in accordance with the Education Act, s. 7, sub-s. 1 (*c*). The "dismissal" of this teacher takes effect in August, after the appointed day, and therefore the consent of the local education authority is required. The new authority having allowed the plaintiff to continue as teacher after the appointed day, there is an implied new contract with him, and he cannot be dismissed except with the consent of the county council, the local education authority.

P. O. Lawrence, *K.C.*, and *A. B. Nutter*, for the defendants. First, we submit that, under the Act of 1902, the new body of managers become the managers under the trust deed, and for the purpose of the trust deed. That is clear from s. 11, sub-s. 6, which enacts that the managers appointed under the Act for a non-provided public elementary school shall be managers of that school for the purposes of the Education Acts, and, so far as respects management, "for the purpose of the trust deed." And, secondly, we submit that any contract entered into with the managers quâ managers is not in any way

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affected by a change in the personnel of the managers. The inference here is that the plaintiff contracted with the managers quâ managers: he relied on the managers for the time being. The Act of 1902 was never intended to disturb the validity of any contract entered into by or with the old managers. Therefore the present contract and the notice of dismissal under it do not really come under the cognizance of the new managing body at all.

Again, this action is irregular; for the plaintiff is suing persons who were not managers at the time of his appointment—that is to say, they are not the persons with whom he contracted; for the defendants, the rector and the two churchwardens, are different; and the fourth defendant has only been recently appointed manager; and moreover they do not constitute the whole body of managers.

Low, K.C., in reply. We will join the other two managers as defendants, if necessary, and we ask leave to amend accordingly. Assuming it to be correct that there was a continuity of managers, the questions to be asked are: (1.) Has the plaintiff been dismissed? And (2.), When was he dismissed? In answer to the first question, we say that beyond question he has been dismissed. That being so, the Act meant that the contract should not be terminated without the consent of the local education authority. And in answer to the second question, we say that the plaintiff was dismissed on August 9, when the notice terminated. The important point is the consent of the local education authority, and that consent has not been given. It is immaterial to inquire by whom the plaintiff was dismissed.

VAUGHAN WILLIAMS L.J. The claim which the plaintiff has presented to us is, to my mind, ill-conceived; and it seems to me that, whatever his rights may be under the statute, this action ought not to have been brought against these four persons, who are some of the members of the body of management as it exists under the Act of 1902. These gentlemen are not the original contracting parties, neither are they the whole of the body of management under the Act of

1902. Mr. Low says that we ought to give leave to amend. One good reason for our not doing so is that, looking at the case that he tells us he would wish to present, that case, if presented by amendment, would, in my judgment, also fail; so that there is nothing to be gained by amendment.

I thought, when this case was first presented to us, that inasmuch as it arose in respect of a teacher of a school governed by the Education Act, 1902, it was desirable carefully to consider the frame of the Act and the provisions which chiefly affect the relations of the body of management with the teachers; but I now agree with Mr. Low that those are matters which really have very little bearing upon the question we have to determine.

Now the claim of the plaintiff is based upon a contract; and he says that the notice that was given on May 6—that is to say, nearly two months before the appointed day arrived on which the Act was to come into force—is ineffective. It is admitted that at the moment that notice was given it was an effective notice; and it is admitted that the effect of the notice was that at the termination of the three months mentioned in it the contract would come to an end by effluxion of time. Unfortunately the written contract is not before us, but the plaintiff in his affidavit sets out what the contract was as against him, and that is sufficient. We learn, therefore, that this was a contract which could be determined by three months' notice on either side. The three months' notice was given, and thereupon it would seem to follow that if the plaintiff is basing his claim on that contract he must take it as a whole, and that he must consider the contract as determined at the end of the three months limited by the notice. But he says that is not so, because the Act of Parliament provides by s. 7, sub-s. 1 (*c*), that the consent of the local education authority shall be required to the dismissal of a teacher. Now it is said that the body of foundation managers are dismissing this plaintiff, and are dismissing him at a date since the appointed day, and that they are so doing without the consent of the local education authority. The answer to that, as it seems to me, is that the term of service of the teacher, the plaintiff, came to an end on August 9, the day on

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which the notice ran out by reason of its having been given for the determination of the contract in accordance with the terms of the contract. If that is so, it seems to me that this clause (*c*) of s. 7, sub-s. 1, has no application to such a case at all.

I wish to guard myself from being supposed to be expressing in this judgment any opinion as to what is the position of the new managers appointed by the Act in respect of contracts made by the old managers before the Act came into force. I say nothing as to how far the managers under the Act of 1902 are or are not bound by such contracts, or are or are not entitled to enforce the terms of such contracts. I say nothing as to who would be the proper parties in litigation, either as plaintiffs or as defendants, if a question arose in any case as to the enforcement of a contract made by the old managers before the arrival of the appointed day on which the Act came into force.

I wish also to say that I express no opinion as to what would be the effect of the new board of management continuing to employ a schoolmaster who had been the schoolmaster before the appointed day, and of their continuing to pay him with moneys provided by the county council, if at the time they provided the moneys the county council knew who was the schoolmaster in fact, and that he was being paid out of those moneys. As to what the effect of that might be I say nothing; that is not the case which is now presented to us. As presented to us it is a case based entirely upon the assumption that the contract made by the old management is the only contract which is material in this case.

That being so, it seems to me that the term of service under the contract has determined by the effluxion of that notice, and that the case of a contract so determined does not fall within the operation of s. 7, sub-s. 1 (*c*). I think this appeal must be dismissed, and dismissed with costs.

ROMER L.J. Even apart from the question as to the parties, which my Lord has dealt with, I am also clearly of opinion that the grounds on which this plaintiff's claim is made entirely fail.

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The plaintiff was employed under a contract made between him and the then managers of the school. Before the Act of 1902 came into operation in the district in which the school is situate, the managers for the time being gave him notice determining his services at the end of a certain period. It is not in dispute that that was a perfectly valid notice rightly given; and the consequence was that, inasmuch as the notice was given before the Act came into operation and terminated after, at the time the Act came into operation the plaintiff was being employed for a term which would end at the expiration of the notice. Now, whatever be the effect of the Act upon the contract, it appears to me that the plaintiff's case must fail.

Take, first, the view that by the operation of the Act the contract was rendered binding upon the new managers, and that the new managers took over existing contracts as they stood: how do matters then stand? The only contract in this case they took over was a contract to employ this plaintiff till the expiration of the notice. On the expiration of the notice his term ceased. In that case the new managers had to do nothing. They had to give no further notice: they had not to do anything which could be held to be a "dismissal" within the meaning of the word as used in this Act. All that they, the new managers, had to do was, when the term of office came to an end according to the term, to appoint any person they thought fit to fill up the vacancy. Nothing they did was wrong, to my mind. They were doing nothing of which anybody could complain, neither the county council nor the plaintiff.

Now, take the other view of the Act of Parliament—that upon the Act coming into operation the original contract terminated. It is common ground that no fresh contract was in fact made as between the new managing body and the plaintiff. Assuming, then, that matters went on as they did, and that we are to imply some contract with the assent of the county council—if that were necessary—what was the contract? The only contract to be implied was a contract to continue to employ the plaintiff until the end of his term: when that term came to an end he ceased to be teacher; then

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the new managing body had to appoint a new master in his place. Again they did nothing, and had to do nothing, on their part with regard to a "dismissal" within the meaning of the Act. Again, there would be nothing of which either the plaintiff or the county council would have any right to complain.

Whichever way, therefore, you view this Act of Parliament, it is clear to my mind that the plaintiff had no right whatever as against the new managing body, and that this action, even if the defect as to parties were cured, wholly fails.

COZENS-HARDY L.J. I am of the same opinion, and I should be content not to add a word, except for one circumstance. I desire to state that, in my view, it is not necessary to express any opinion, and I do not express any opinion, on many of the points which have been argued before us. The question whether contracts entered into before the appointed day with the old managers are enforceable by or against the new body of managers created by the Act, is one upon which I have nothing to say. I desire to keep an entirely open mind on that question until it becomes necessary for the Court to decide it; but in my view it is wholly unnecessary to express any opinion upon that question on the present occasion. If the rights under the old contract can be enforced by the plaintiff against the new managers, it seems to me plain that they can be only the rights under the contract which was in existence on July 1, when the Act came into operation; and on July 1 the only contract which was in existence was a contract for a term expiring in August. If, however, the rights under the old contract cannot be enforced against the new managers, still less can the plaintiff have any relief in this action. There is the further ground, and one to which I am not able to see any answer, that the plaintiff has brought the wrong defendants before the Court, so that he cannot obtain any relief as against them.

Solicitors: *Baker & Nairne; Crawley, Arnold & Co.*

G. I. F. C.

In re OLIVER'S SETTLEMENT. EVERED *v.* LEIGH.

FARWELL J.
1904
Nov. 14, 17.

[1904 O. 117.]

Settlement—Real Estate—Limitations—Equitable Estate in Fee—No Words of Inheritance—Will Power—Appointment void for Remoteness—Election.

A limitation in a deed of a trust of real estate for a class of children without any words of inheritance may confer the equitable fee upon them where the intention to do so is expressed or sufficiently shewn on the face of the instrument.

By a marriage settlement dated in 1831 real estate was conveyed to a trustee upon trust for the husband and wife successively for life, and after their deaths upon trust to convey and transfer the trust estate between or among the children of the marriage as the husband and wife should jointly appoint, and in default as the survivor should appoint, and in default to all the children of the marriage who attained twenty-one, or married, in equal shares. The settlement contained a provision that no child taking under any appointment should receive anything more until all the other children had received shares equal in value to the appointed share; a power of advancement up to one-half the value of each child's share; and a gift over if no child attained a vested interest:—

Held, that there was on the face of the instrument amply sufficient indication of an intention that the children should take equitable interests in fee simple.

In re Tringham's Trusts, [1904] 2 Ch. 487, followed.

The husband, having survived his wife, by will, in exercise of the power given him by this settlement, appointed shares of the property to his three daughters for life, with remainder to their respective children, and gave his daughters interests in property of his own:

Held, that, the appointments being void for perpetuity, no case of election was raised by the will.

In re Bradshaw, [1902] 1 Ch. 436, not followed.

By a settlement dated May 24, 1831, and made on the marriage of John Oliver and Sarah Chard, certain lands the property of William Chard the elder, and other lands the property of John Oliver, were assured to the use of William Chard the younger and his heirs upon trust for John Oliver and his wife successively for life, and after the death of the survivor to "release, convey, and transfer all the trust estate" between or among such child or children of the marriage and the issue, if any, of the same child or children who should die

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in the lifetime of the said John and Sarah Oliver or the survivor leaving issue then living at such ages, in such manner, and in such shares and proportions as the said John Oliver and Sarah Oliver should by deed jointly appoint, and in default of such appointment as the survivor should by deed or will appoint, and in default of such appointment to all the children of the marriage who should attain twenty-one, or being daughters marry under that age, in equal shares. The settlement contained a proviso that no child who took any part or share of the trust funds or property under any appointment made under either of the powers aforesaid should have or be entitled to any further or other share until every other child of the marriage should have been paid or become entitled to a share or shares thereof equal in value to the appointed share. The settlement also contained a power for the trustee to raise any part or parts of the portion intended to be thereby provided for any child, not exceeding in the whole one-half part of the value of his or her expectant portion of and in the said trust estates, and apply the same for his or her advancement and benefit. And the settlement directed that, if there should be no child of the intended marriage who should attain a vested interest under the trusts aforesaid, the trustee should stand possessed of the lands settled by John Oliver in trust for such persons as he should appoint, and in default of appointment for his right heirs.

There were five children of the marriage, namely, one son, who died unmarried and intestate in the year 1866, and four daughters, one of whom attained twenty-one and died unmarried in the lifetime of John Oliver; the other three, namely, Mary Elizabeth Leigh, Susan Frith, and Caroline Chard Reynolds, were all married in John Oliver's lifetime and survived him, and had children living at his death.

Sarah Oliver, the mother, died in February, 1884.

John Oliver by his will dated September 10, 1886, after reciting that a sum of 1800*l.*, then in Stuckey's Bank, was subject to the trusts of the settlement under which he had a power of appointment and distribution, gave the said sum of 1800*l.* to the trustees of his will upon the trusts, as to 1000*l.* for the benefit

of Caroline Chard Reynolds and her issue, as to 200*l.* for the benefit of Mary Elizabeth Leigh and her issue, and as to the remaining 600*l.* for the benefit of Susan Frith and her issue, which were thereafter declared of the hereditaments comprised in the three schedules to his will. He gave all his personal estate to trustees in trust for his said three daughters in equal shares, and he directed that the hereditaments described in the 1st schedule should be held in trust for Susan Frith for her life, without power of anticipation, and after her decease for her children in such shares as she should appoint and, in default of appointment, for all her children who should attain twenty-one, or being daughters marry, in equal shares. And he declared similar trusts of the hereditaments mentioned in the 2nd and 3rd schedules respectively in favour of his daughters Mary Elizabeth Leigh and Caroline Chard Reynolds and their respective children. All these schedules included some of the lands subject to the trusts of the said settlement and other lands of the testator's own.

The testator, John Oliver, died on September 13, 1888.

The said Caroline Chard Reynolds died on January 14, 1903, leaving children her surviving.

This summons was taken out by the surviving trustee of the settlement, who was also one of the trustees of John Oliver's will, for the determination of the questions (amongst others) whether under the settlement the children of John Oliver took equitable interests in fee simple or for life; whether the appointments made by the said will were valid; and whether any case of election was raised by the said will.

This summons came on for hearing on November 14, 1904.

Stafford Crossman, for the trustee.

Baker, for the children of Mrs. Reynolds other than F. W. Reynolds, the eldest son. In this case the children took equitable estates in fee simple. It is admitted that a simple gift of real estate in trust for A. for life, after his death for his children without words of limitation, will not pass an equitable fee: *Holliday* v. *Overton* (1); but *Pugh* v. *Drew* (2) and the

(1) (1852) 15 Beav. 480. (2) (1869) 17 W. R. 988.

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recent decision of Joyce J. in *In re Tringham's Trusts* (1) shew that an equitable fee will pass without words of limitation if there is on the face of the instrument a sufficient indication of intention that it should pass. In this case the trustees took the fee, and they are directed to convey to the children the trust estate—that must mean all the estate they had. The hotchpot clause, which is in an unusual form, and the advancement clause both require the value of a child's share to be ascertained before it falls into possession, and it cannot be supposed that the parties intended a valuation to be made of a reversionary life interest. The gift over, if no child attains a vested interest, implies that the whole property was disposed of in every other event. On the whole instrument, therefore, there is an irresistible expression of an intention that the children should take the fee.

L. Ryland, for Mrs. Reynolds' legal personal representatives.

Sherrington, for Mrs. Frith.

E. Ford, for Mrs. Leigh.

H. A. Smith, for persons claiming under the heir-at-law of William Chard the elder.

Elgood, for F. W. Reynolds. It is the interest of F. W. Reynolds to contend that the settlement only gave life interests to the children of John Oliver, for in that case the fee descended on the three daughters as heiresses-at-law, and he is entitled to the whole of his mother's share.

In *Pugh* v. *Drew* (2) there was a gift of leaseholds in trust for A. and B. in equal shares, and a settlement of freeholds upon the same trusts. It would have been impossible to hold that A. and B. did not take an absolute interest. In this case no intention is expressed either way, and it is plain from the rest of the settlement that the draftsman knew how to give an interest in fee when he intended to do so.

FARWELL J. The law upon this point has been very recently stated by Joyce J. in *In re Tringham's Trusts* (1), and I need not therefore state it again. [His Lordship read the first paragraph of the head-note in that case.] I adopt that

(1) [1904] 2 Ch. 487. (2) 17 W. R. 988.

as a correct statement of the law, and all I have to consider is whether in the case before me there is sufficient to shew an intention that the children should take the fee. I think there is. The trustees are directed to convey the trust estate to the children, and that naturally means all the estate they had. The power of advancement seems almost conclusive, for it is hardly conceivable that the parties intended an advance to be made of half the value of a life estate in remainder. But I think that the gift over, if there should be no child who should attain a vested interest, is absolutely conclusive. If Mr. Elgood's argument were right, the gift over could only take effect in one out of very many possible events.

Stafford Crossman, for the trustee. The remaining question is whether the appointments by the will, which are clearly bad in themselves, can be validated by the doctrine of election.

FARWELL J. Can the doctrine of election be used to validate a gift which is void for perpetuity?

E. Ford, for Mrs. Leigh. My client does not wish to contend that she is not bound by the will.

Baker, for the children of Mrs. Reynolds. The doctrine of election applies to an appointment under a power as well as to a direct gift: *Cooper* v. *Cooper*. (1) Pearson J. in *In re Warren's Trusts* (2) held that no case of election was raised when the gift to be established by that doctrine was void for perpetuity. But the judgment of Kay J. in *In re Brooksbank* (3) shews that he doubted the correctness of that decision. Chitty J. held that the rule did not apply to the case of a married woman restrained from anticipation: *In re Wheatley* (4); but that was because the will itself, by imposing the restraint on anticipation, has made it impossible for the married woman to give up her interest as the doctrine of election would require.

The exact point has recently been decided by Kekewich J.

(1) (1874) L. R. 7 H. L. 53.
(2) (1884) 26 Ch. D. 208.
(3) (1886) 34 Ch. D. 160, 165.
(4) (1884) 27 Ch. D. 606.

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in *In re Bradshaw* (1), where he refused to follow *In re Warren's Trusts* (2) and *In re Handcock's Trusts.* (3)

Cur. adv. vult.

Nov. 17. FARWELL J. The testator in this case has exercised a limited power of appointment vested in him in such a way as to contravene the rule against perpetuities, and has by the same instrument given to the persons entitled in default of appointment benefits out of his own property. The question for my determination is, Does this raise a case of election? I reserved my judgment because there is a conflict of authorities on the subject by reason of Kekewich J.'s recent decision in *In re Bradshaw.* (1) I propose first to consider the question on principle, and then to examine the authorities.

The rule against perpetuities is a comparatively modern development of the ancient rule of English law that one of the inseparable incidents of property is the right of alienation by appropriate assurances. The rule is one of public policy, and it has always been considered to be the duty of all the Courts to uphold it, not to assist in evading it, and accordingly the maxim "Quodcunque prohibetur fieri ex directo, prohibetur et per obliquum" has on many occasions been applied so as to give full effect to this rule. It is sufficient to refer to the well-known case of *Spencer* v. *Duke of Marlborough* (4), where Lord Northington, and the judges who advised the House of Lords, and the Lords were unanimous in applying it. The testator in that case attempted to evade the rule by creating an estate tail with powers in trustees to revoke the uses from time to time as tenants in tail were born, and resettle so as to make such tenants in tail tenants for life with remainders in tail, and a bill was filed for the execution of the trusts of the will, and it was unsuccessfully argued that, though estates could not be directly limited to the extent desired, yet that the Court of Chancery, "which professes to regard the intent of

(1) [1902] 1 Ch. 436.
(2) 26 Ch. D. 208.
(3) (1889) 23 L. R. Ir. 34.
(4) (1759) 1 Eden, 404; (1763) 3 Bro. P. C. 232.

testators, will allow it to be done arte vel ingenio, and per obliquum."

The doctrine of election is a rule of equity by virtue of which the Court of Equity compels a recipient of the testator's bounty to conform to all the legal provisions of the will. It is somewhat startling that this Court should be asked to extend it to illegal provisions, and to apply its doctrines for the purpose of enabling a testator to evade a rule of law founded on public policy. Lord Northington (1) puts it somewhat strongly. After referring to the various attempts that had been made at law to evade the rule against perpetuity, he says: "It seems to me most surprising, that after these puerile attempts had been made upon the narrow, fettered, and technical reasonings of Courts of law, and been rejected and exploded with contempt and derision, that it could ever have entered into the head of man to think, that he could subvert the fundamental principles of property, by the aid of this Court." And Sir Richard Arden M.R. in *Mainwaring* v. *Baxter* (2), where another attempt at evading the rule against perpetuities was made, said that he adopted Lord Northington's words. Kekewich J. has said, and it is the basis of his judgment, that it is immaterial whether the appointment fails because it offends some rule of law, or because it offends the construction of the power. With all deference to him, the difference appears to me to be vital. In the one case the testator openly and avowedly breaks the general law, and asks the Court of Equity to participate in his illegal act by giving effect to it; in the other he merely attempts to exceed the limits set to his power by the donor thereof in the particular case—limits which the donor might have extended without any breach of general law. Thus, limitations which infringe the rule against perpetuity are void on the face of the will, but a devise of Blackacre by a testator who has no interest therein is not illegal, nor is it void on the face of the will, but depends on an inquiry into the testator's title.

It is the well-known distinction pointed out by Lord Westbury in *Cooper* v. *Phibbs* (3) between the general law

(1) 1 Eden, 417. (2) (1800) 5 Ves. 458.
(3) (1867) L. R. 2 H. L. 149, 170.

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of the country, for ignorance of which no one is excused, and private rights which depend on the ascertainment of particular facts.

In considering a will this Court has first to construe the words, and then to apply to them such rules of general law (e.g., the rule against perpetuity or the Thellusson Act) as may be appropriate: *Pearks* v. *Moseley*. (1) If it thereupon appears that there is any infringement of such rules, the Court is bound to refuse to allow its process to be used to carry out such illegality, and that, too, whether any of the parties to the litigation raise the objection or not: *Evans* v. *Richardson*. (2) How is this compatible with the order that I am asked to make here, by which I should first declare the appointment illegal and void for perpetuity and then give practical effect to it by putting in force the equitable doctrine of election? There is certainly no novelty in the statement that this Court will refuse to aid a testator to commit any breach of the law. Lord Hardwicke explains the refusal of the Court to marshal assets in favour of a charity by saying that he "was not warranted to set up a rule of equity, contrary to the common rules of the Court, merely to support a bequest which was contrary to law": *Mogg* v. *Hodges*. (3) Other instances will be found referred to in Lindley on Partnership, 6th ed. pp. 110–114. I have gone into this more fully than I should have otherwise thought necessary out of deference to Kekewich J.'s judgment, the whole foundation of which is that it is immaterial whether the appointment fails for illegality or merely on a point of construction, and I can only say that on principle I am wholly unable to agree with him.

But when I come to the authorities on the particular point before me, it appears to me that there is an overwhelming concurrence of judicial opinion against Kekewich J.'s view. The first case is *Wollaston* v. *King* (4), before James V.-C. It is said that the Vice-Chancellor's statement is only a dictum. I doubt if it is so; it seems to me to be one of several reasons for his judgment. He says: "It is also material that the reason why the gift fails is that there was an attempt to create

(1) (1880) 5 App. Cas. 714.
(2) (1817) 3 Mer. 469.
(3) (1750) 2 Ves. Sen. 52.
(4) (1869) L. R. 8 Eq. 165, 175.

a power in violation of the rules of law. I apprehend that it is not for this Court to aid such an attempt, either by the application of the doctrine of election or otherwise." But if it be a dictum only, it comes from a great judge, and I desire to adopt it as in my opinion a correct statement. The next case is *In re Warren's Trusts* (1), which is an express decision of Pearson J. exactly in point. It is said that it was not argued; but I cannot regard the decision as of less weight, because the judge obviously thought the point unarguable, and I am not aware that the decision has ever before been doubted. But the case does not rest there, for the point has recently been before a strong Court of Appeal in Ireland in *In re Handcock's Trusts* (2), and they unanimously approved *In re Warren's Trusts* (1) and *Wollaston* v. *King*. (3) Their decision is not, of course, binding on the English Courts, but I cannot help feeling more confidence in the decision at which I have arrived when I find it shared by Lord Ashbourne L.C. and FitzGibbon, Naish, and Barry L.JJ., and similar reasons given. These reasons may be summarized from pp. 47 and 48 of the report thus: That the Court refused to trench on the rule against perpetuity, a rule introduced on grounds of public policy, or to aid in tying up trust property for a period beyond legal limits. They would not allow the Court to be put to carry out an appointment of the settled fund in violation of the rule against perpetuity. I therefore respectfully decline to follow *In re Bradshaw* (4), and I declare the limitations in this will, being illegal and void for perpetuity, cannot be used to raise any case of election in this Court. It is perhaps hardly necessary to add that the fact that the limitations also exceed the limits of the power is immaterial. The Court is bound on finding illegality to refuse to assist in carrying it out.

Solicitors: *Grubbe & Troughton, for Evans & Taylor, Bristol; Cameron, Kemm & Co., for C. D. Miller, Derby; Scott, Spalding & Bell, for Barham & Son, Bridgwater; Seymour Williams & Co., for Lawrence, Williams & Watts, Bristol.*

(1) 26 Ch. D. 208, 219.
(2) 23 L. R. Ir. 34.
(3) L. R. 8 Eq. 165.
(4) [1902] 1 Ch. 436.

J. R. B.

BUCKLEY J.

1904

July 12.

In re CLUTTERBUCK'S SETTLEMENT. BLOXAM *v.* CLUTTERBUCK.

[1904 C. 1458.]

Settlement—Covenant to settle After-acquired Property—Property purchased with Accumulations of Income.

Property purchased with the savings of a wife's income under settled property is not within a covenant by her in her marriage settlement to settle property to which she may thereafter become entitled.

Finlay v. *Darling*, [1897] 1 Ch. 719, followed.

In re Bendy, [1895] 1 Ch. 109, not followed.

A SETTLEMENT dated June 22, 1863, made on the marriage of the Rev. John Balfour Clutterbuck and Catherine Purslow Clutterbuck (then C. P. Cresswell), spinster, directed a sum of money to be held by the trustees of the settlement in trust for C. P. Clutterbuck for life, but during her then intended coverture for her separate use without power of anticipation, and after her death upon the trusts thereinafter declared. The settlement contained the following clause: "And it is hereby agreed and declared that if the said Catherine Purslow Cresswell now is or if during the said intended coverture she or the said John Balfour Clutterbuck in her right at one and the same time and from one and the same source shall become seised or possessed of or entitled to any real or personal property of the value of 200*l.* or upwards for any estate or interest whatsoever in possession, reversion, remainder, or expectancy (except jewels, trinkets, ornaments, furniture, plate, pictures, prints, and books, and other articles of the like nature, which it is hereby declared shall belong to the said Catherine Purslow Cresswell for her separate use), then and in any such case the said Catherine Purslow Cresswell and John Balfour Clutterbuck and all other necessary parties shall at the cost of the said trust estate as soon as circumstances will admit, and to the satisfaction of the said trustees or trustee for the time being, convey, assign, and assure the said real or personal property to

or otherwise cause the same to be vested in the said trustees or trustee" upon the trusts thereinafter declared.

Mrs. Clutterbuck from time to time saved and set apart the income of the settled fund until at the date of the conveyance mentioned below the savings amounted to 300*l.*

By a conveyance dated December 31, 1894, in consideration of 1300*l.* expressed to be paid by her, certain hereditaments were conveyed to her in fee.

This sum of 1300*l.* consisted of the 300*l.* in savings and a sum of 1000*l.* which Mrs. Clutterbuck borrowed, and to secure which she on January 1, 1895, mortgaged the property conveyed to her.

The trustees of the settlement took out an originating summons for the determination of the question whether they were entitled under or by virtue of the agreement for the settlement of other and after-acquired property therein contained to have a conveyance from Mrs. Clutterbuck of the hereditaments so conveyed to her.

G. E. Cruickshank, for the trustees, stated the facts to the Court.

H. B. Howard, for Mrs. Clutterbuck. The covenant to settle after-acquired property does not extend to the property purchased with the savings.

But for the decision of Kekewich J. in *In re Bendy* (1), it would seem clear that the covenant did not apply to invested savings of income: *Churchill* v. *Denny* (2); *Hughes* v. *Jones*. (3) In *In re Bendy* (1), however, Kekewich J. came to a different conclusion, but *Churchill* v. *Denny* (2) was not cited in that case; and in *Finlay* v. *Darling* (4) Romer J. declined to follow *In re Bendy*. (1) Kekewich J. in *In re Dowding's Settlement Trusts* (5), after referring to *Lewis* v. *Madocks* (6), said: "It did occur to me when the question came before me in *In re Bendy* (1) that the Lord Chancellor meant that where a general

(1) [1895] 1 Ch. 109.
(2) (1875) L. R. 20 Eq. 534.
(3) (1863) 1 H. & M. 765.
(4) [1897] 1 Ch. 719.
(5) [1904] 1 Ch. 441, 446.
(6) (1803) 8 Ves. 150; (1810) 17 Ves. 48; 7 R. R. 10.

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covenant of that kind came before the Court it was the duty of the Court to execute it, however absurd it might be, and however great the practical difficulty might be in giving effect to it. But in a similar case before Romer J.—*Finlay* v. *Darling* (1)—he differed—and I have no doubt differed soundly—from the view which I took of Lord Eldon's decision in *Lewis* v. *Madocks*. (2)"

In re Bendy (3) ought not now to be followed.

[He was stopped.]

Douglas, for the children of Mrs. Clutterbuck. Although the income is not subject to the covenant for after-acquired property, the property purchased with it is. In *Lewis* v. *Madocks* (4) Lord Eldon says: "Suppose, the husband possessing 600*l.* had borrowed 600*l.*, and bought an estate of the value of 1200*l.*, and died that moment. If the former sum is to answer for the money borrowed, the wife gets nothing by the covenant under such circumstances. I incline to think, the money borrowed must be considered personal estate, of which he was possessed." And later (5) he said he "could not adopt the construction, that annual produce, for instance, dividends of stock, was property acquired during the coverture in the sense of this bond; except only to the extent in which the husband himself might think proper to lay up that produce as capital." Here Mrs. Clutterbuck, by laying up the income as capital, has brought it within the covenant.

BUCKLEY J., after stating the facts, continued:—The question raised by the summons is whether the trustees of the settlement are entitled, under the agreement for the settlement of other or after-acquired property therein contained, to have a conveyance from Catherine Purslow Clutterbuck of the hereditaments which were conveyed to her by the indenture of December 31, 1894. I fail to find any ground for holding that the trustees are so entitled. In the first place, looking at the case apart from authority, the covenant extends only to

(1) [1897] 1 Ch. 719.
(2) 8 Ves. 150; 17 Ves. 48; 7 R. R. 10.
(3) [1895] 1 Ch. 109.
(4) 8 Ves. 150, 157.
(5) 17 Ves. 55.

property to which Mrs. Clutterbuck at the date of the settlement was or should during the intended coverture become entitled. Her right in respect of the income to accrue to her under the settlement is not within those words; it arose under the settlement itself. Further, the property referred to in the covenant must be property to which she becomes entitled "at one and the same time and from one and the same source." She did acquire property which in time amounted to 300*l.*, but not at any one time, but by the aggregation of sums received from time to time during successive half-years. In *Churchill* v. *Denny* (1) the husband at the time of his marriage was in receipt of half-pay, as a lieutenant in the Royal Navy. He subsequently commuted it for a sum of 2175*l.* 10*s.* It was contended that he became entitled to the commutation money at the date of the settlement, or at any rate when he commuted his pay. Jessel M.R. held that the commutation money was not within an agreement to settle similar to that in the present case. Sir George Jessel there said, "If a man has something to sell, and he sells it, and gets the purchase-money, he does not acquire a future title, for it is his title to his property which enables him to get the money for it, or to vary the investment, and varying an investment is not acquiring any title." Applying that principle to the present case, the accumulating of the income and the investment of it were not the acquiring of a title to the resulting accumulations or to the property bought. Then in *Lewis* v. *Madocks* (2) the question which arose for decision was what was the effect of a covenant by a husband to settle all the personal estate of which he should at any time during the coverture be possessed. The effect of Lord Eldon's decision is that it could not have been intended to sweep up every sovereign acquired by the husband during the coverture, as, if such were the case, the effect would be to deprive him of the means of living; but that if a man so accumulated and dealt with his income as to capitalise it a covenant in the form in that case would extend to that. That decision does not apply to the present case. Here the lady has not covenanted to settle all the property she may be

(1) L. R. 20 Eq. 534, 536. (2) 8 Ves. 150; 17 Ves. 48; 7 R. R. 10.

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possessed of, and that makes the case essentially different from *Lewis* v. *Madocks*. (1) The decision of Kekewich J. in *In re Bendy* (2) has already been commented on by Romer J., as he then was, in *Finlay* v. *Darling* (3), and Romer J. did not follow *In re Bendy*. (2) I propose to take the same course, and the more readily because I find that Kekewich J. in *In re Dowding's Settlement Trusts* (4) makes some comments on his own decision in *In re Bendy* (2) and on that of Romer J. in *Finlay* v. *Darling* (3) which shew that if he had reconsidered his own decision he might have preferred to take the view taken by Romer J. The case before me is plainer than *Finlay* v. *Darling* (3), for in that case the covenant was that, if during the intended coverture the wife should become seised, possessed of, or entitled to any real or personal property of the value of 200*l.* or upwards, she should settle it. In the present case there is this additional element—that the words are, "at one and the same time and from one and the same source." Those words did not occur in *Finlay* v. *Darling* (3); but nevertheless, in the absence of those words, Romer J. decided that the ncome was not within the covenant. I hold that the property purchased by Mrs. Clutterbuck out of her own savings of income is not within the covenant contained in her marriage settlement, but belongs to her for her own benefit.

Solicitors for all parties: *Bloxam, Ellison & Co.*

(1) 8 Ves. 150; 17 Ves. 48; 7 R. R. 10.
(2) [1895] 1 Ch. 109.
(3) [1897] 1 Ch. 719.
(4) [1904] 1 Ch. 441, 446.

F. E.

BUCKLEY J.

1904

Nov. 18, 21, 22, 23, 24; *Dec.* 3.

EARL OF HARRINGTON *v.* CORPORATION OF DERBY.

[1902 H. 3973.]

Injunction—Nuisance—Pollution of River—Local Government—Sanitary Authority—Neglect of Duty—Damages—Non-feasance—Misfeasance—Continuance of Injury—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 17, 19, 299—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

The river Derwent was polluted by sewage from (1.) old sewers into which householders of Derby had for more than twenty years discharged their sewage; (2.) sewers inherited by the defendants, the corporation of Derby, from their predecessors, into which householders had by virtue of their statutory rights made connections; (3.) sewers laid by the defendants themselves; (4.) additional sewage arising from the conversion of privies into water-closets under directions given by the defendants. The plaintiffs owned Elvaston Castle and estate situated on the river about five and a half miles below Derby, and brought this action for an injunction to restrain the defendants from polluting the river so as to cause a nuisance; damages for the silting up of a lake fed from the river by a watercourse which had to be stopped up in 1902; the loss of a water-wheel which had been worked by the watercourse, and the expense of replacing it by an engine; pollution to a well into which water percolated from the lake; depreciation of a house on the bank of the river and to the castle; the expense of obtaining a new water supply; and for injury to the fishing. In 1898 an order was made in the Derbyshire County Court, in an action brought by the county council, that the defendants should abstain from polluting the river contrary to the Rivers Pollution Prevention Act, 1876. By the Derby Corporation Act, 1901, the defendants obtained the necessary powers, and they had now commenced to construct sewerage works for the whole of their area:—

Held, that, inasmuch as the householders had obtained in the first two classes of sewage prescriptive rights which could not be interfered with by the defendants, an order had been made under the Rivers Pollution Act of 1876, and the defendants were taking steps to remove the nuisance, no injunction ought to be granted; that the action would not lie against the defendants for non-feasance or neglect of duty under the Public Health Acts; the plaintiffs' remedy against them in that respect was by complaint to the Local Government Board under s. 299 of the Public Health Act, 1875; s. 17 of that Act must be read only as a proviso; and s. 19 did not apply to the present case; that the action would lie against the defendants for damage caused by acts which they had done themselves; that this did not make the defendants liable for the whole of the damage; that the plaintiffs could recover damages for the expense of procuring a

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new water supply and engine, and for the injury to the house and the fishing; they could not recover for injury to the amenities of the castle nor for the silting up of the lake, for they ought to have excluded the water when they found it was polluted.

Continuance of injury under s. 1, sub-s. (*a*), of the Public Authorities Protection Act, 1893, does not mean damage inflicted once and for all which continues unrepaired, but a new damage recurring day by day in respect of an act done it may be once and for all at some prior time, or repeated it may be from day to day; under that sub-section an action may be instituted within six months of the ceasing of the continuing injury; therefore the plaintiffs were entitled to recover for a greater period than six months and up to the six years limited by the Statute of Limitations.

THIS was an action brought by the tenant for life and the trustees of the Elvaston Castle estate, near Derby, for an injunction restraining the mayor, aldermen, and burgesses of the borough of Derby from polluting the river Derwent by discharging sewage into it so as to cause the river to be a nuisance; an order that the defendants should remove from the plaintiffs' lands the deposit of foul matter caused by the pollution, and cleanse a lake and watercourse; and damages.

The lands in question were about five and a half miles by river below Derby. Upon them was Elvaston Castle, surrounded by a park and pleasure grounds. In the park was a lake fed from the river by a watercourse about three quarters of a mile in length. Water from the lake percolated into a well, from which it was pumped into the castle by means of a waterwheel in the watercourse, and was used for domestic purposes. As the population of Derby grew the pollution of the river increased to such an extent that in July, 1902, Lord Harrington was compelled to cut off the river water from the lake and put up a pump and engine-house, and obtain a supply of water from elsewhere for the castle, and also for watering cattle and horses on the land. The deposit of foul matter by the river in times of flood upon the land was injurious to the plaintiffs' cattle, and all the fish in that part of the river were killed.

The defendants were the urban sanitary authority for the borough of Derby under the Public Health Act, 1875, and the Acts amending that Act, and were also the authority for

the execution of an Act passed in 1825 for the better paving and otherwise improving the borough of Derby. For many years the sewage of Derby had been discharged untreated into the Derwent through outfalls which had been constructed many years ago. The defendants did not admit responsibility for their construction. In 1877 and in 1901 the boundaries of the borough of Derby were extended by the inclusion of other districts, and the population was now stated to be about 120,000. From the year 1872 till his death in 1880 the late Earl of Harrington, and since that time the present Earl, had made many complaints of the pollution, but the defendants met them by stating that matters were shortly going to be improved and that they were considering other schemes for dealing with the sewage. On December 6, 1898, an order was made by the Derbyshire County Court in an action brought by the Derbyshire County Council against the defendants that, subject to certain conditions, the defendants should abstain from polluting the river contrary to the provisions of Part II., s. 3, of the Rivers Pollution Act, 1876. By the Derby Corporation Act, 1901, the defendants obtained the necessary powers, and they had now commenced to construct sewerage works for the effective treatment and disposal of the sewage of the whole of their drainage area. The time limited for the execution of the works had been extended to January 1, 1906. They denied that there was any nuisance; alleged that they were not responsible for the outfalls which had been made by their predecessors; that they could not interfere with the prescriptive rights of individuals to use the sewers; that the pollution, if any, was due to other causes; and that they had acquired a prescriptive right to discharge sewage into the river.

The effect of the evidence is stated in the judgment.

Macmorran K.C., and *R. Cunningham Glen*, for the plaintiffs. It is the duty of the defendants to prevent the discharge from their sewers from being a nuisance, for the discharge of sewage into a river is absolutely prohibited by law. The defendants derived their power to make these outfalls from the Public Health Act, 1848, applied to Derby in 1850 by the Local

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Government Act, 1850. That Act and the Local Government Act, 1861, expressly forbid the turning of unpurified sewage into a river. That provision is re-enacted in s. 17 of the Public Health Act, 1875. So at all events it could not be done after 1861. Sect. 299 of the Public Health Act, 1875, has nothing to do with this case. We are not complaining that the defendants have made default in providing sewers.

We have a right to maintain this action for damages, and we are content to take damages instead of a mandatory order to remove the deposit.

Danckwerts, K.C., and *R. J. Parker*, for the defendants. We are not responsible for the pollution. Prescriptive rights have been acquired in respect of all sewers constructed more than twenty years before the issue of the writ. The case against us really is that we are not carrying out the duties imposed on us by the Public Health Act, 1875. The plaintiffs have to prove against us something in the nature of misfeasance; mere non-feasance is not enough. It is not enough to say that we have left undone something which the Public Health Acts say we ought to have done. We have not constructed these outfalls. We have a legal right to pass through outfalls constructed more than twenty years ago as much sewage as they will carry. The increase is due to the natural growth of the population, or to fresh connections made by the inhabitants with our sewers. We cannot prevent that. These sewers were vested in us by Act of Parliament. They are not our property in the ordinary sense: *Tunbridge Wells Corporation* v. *Baird*. (1) The few sewers we have made have caused no material increase.

Originally, by a private Act of 1825, the drainage of Derby was under the control of commissioners. Then by the Public Health Act, 1850, provisional orders of the general board of health made under the Public Health Act, 1848, were applied to Derby, and the corporation thus became the local board of health.

By the Public Health Act, 1848, s. 43, sewers were transferred to the local board of health, and by s. 45 they were

(1) [1896] A. C. 434.

authorized to construct new ones. The Local Government Act, 1861, s. 4, gave power to make sewers outside the district. The proviso to that section prevents the local authority from turning sewage into a stream; but it does not apply to this case, for all the outfalls complained of are within our area. It is, however, to be inferred from that that we have the power to do so within the area.

The Public Health Act of 1872 is merely preliminary to the Public Health Act, 1875, under which the local board became the sanitary authority. By s. 13 of the latter Act sewers are vested in the local authorities, who by ss. 14, 15, and 16, have power to purchase, repair, and make sewers. By s. 17 it is provided that nothing in the Act should authorize them to turn sewage into streams before it is purified. That assumes that they would otherwise have that power. The result of s. 17 is that we cannot argue that the Act of 1875 gave us a right to pollute the Derwent; but if we can shew that we have that power outside the Act the section does not prevent us from exercising it. It assumes that the previous Acts had given the power: *Durrant* v. *Branksome Urban Council.* (1) By s. 21 every owner of premises within the district has the right to cause his drains to enter into the sewers of the local authority. The board cannot prevent that. All they can do is to control the communications. By s. 22 the owner of premises outside the district can connect his drains with the sewers of the local authority on terms to be agreed upon. By s. 299 any complaint of default of a local authority in respect of sewers must be made to the Local Government Board. That is the plaintiffs' only remedy. They cannot accuse us of anything more than neglect of duty, and they have no right to bring this action: *Pasmore* v. *Oswaldtwistle Urban Council* (2); *Robinson* v. *Workington Corporation.* (3)

The Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 3, prohibits drainage into streams. The proviso at the end of the section shews that individuals are not liable

(1) [1897] 2 Ch. 291.

(2) [1897] 1 Q. B. 625; [1898] A. C. 387.

(3) [1897] 1 Q. B. 619.

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under that Act; so we cannot prevent persons who have prescriptive rights from passing sewage into our drains: *Reg.* v. *Staines Local Board.* (1) Sect. 3 of the Act of 1876 is extended to water which in fact flows into any stream by the Rivers Pollution Prevention Act, 1893. No offence is committed where the sanitary authority says it is using the best available means of stopping pollution. Under ss. 8, 10, and 11 the plaintiffs might have brought the action in the county court in 1898 themselves instead of putting in motion the county council.

Prescriptive rights cannot be acquired against public authorities; so we had no defence to that action; but they can be acquired against an individual who is aggrieved. The proviso to s. 8 preserves any rights the plaintiffs have if they are persons aggrieved. We have as against the plaintiffs acquired a right to pollute the Derwent from outfalls more than twenty years old. It is an easement. The dominant tenement is the sewer; the servient tenement is the plaintiffs' property. Protesting was not enough; they ought to have taken steps to stop the nuisance. A prescriptive right of this kind covers the whole capacity of the sewer; and the increase in the amount of sewage is immaterial. An increase is inherent in the nature of the dominant tenement. The plaintiffs cannot shew that but for the pollution, so far as it has been increased by us, there would have been no damage. The damage would really have been the same if we had done nothing; and the plaintiffs would have had no remedy against anybody. The Court will not grant an injunction which will interfere with prescriptive rights which we cannot put a stop to: *Attorney-General* v. *Dorking Union* (2); *Brown* v. *Dunstable Corporation.* (3) In *Attorney-General* v. *Acton Local Board* (4), which does not apply to this case because there were no prescriptive rights, an injunction was granted restraining the defendants from authorizing or directing, but not from permitting, the flow of sewage. The defendants were not called upon to prevent the inhabitants from connecting their drains with the sewers. We can only

(1) (1888) 60 L. T. 261.
(2) (1882) 20 Ch. D. 595.
(3) [1899] 2 Ch. 378.
(4) (1882) 22 Ch. D. 221.

stop the pollution by constructing new works, and the plaintiffs cannot oblige us, who have done no harm, to exercise our powers for their benefit: *Attorney-General* v. *Clerkenwell Vestry* (1); *Glossop* v. *Heston and Isleworth Local Board.* (2) The Court will not saddle us with the consequences of non-feasance under the Acts: *Cowley* v. *Newmarket Local Board* (3); *Russell* v. *Men of Devon.* (4) The principle applies to an action for damages as well as to an action for an injunction.

The plaintiffs have no ground of complaint. They and their predecessors in title have known for forty years and more that the sewage went into the river, and they took no action. They have intentionally admitted the water on to their land although they knew it was foul. If it has fouled their lake and well it is their own fault, and they cannot recover damages for it: *Adams* v. *Lancashire and Yorkshire Ry. Co.* (5); *Gee* v. *Metropolitan Ry. Co.* (6) As riparian owners they were entitled to use the water for proper purposes; but if they took it knowing it to be polluted they have no remedy. We are liable for the loss they have suffered from not being able to use the water, but not for injury caused by their use of it. The silting up of the lake was caused by vegetable matter brought down the stream from above Derby, and dead leaves from trees and dead weeds in the water. It was not caused by sewage.

Under s. 1, sub-s. (*a*), of the Public Authorities Protection Act, 1893, the plaintiffs can only recover damages for wrongful acts done by us within six months before the action was brought. The cause of action is sending the sewage down the river. Every moment that that continues there is a fresh offence, and the cause of action is complete. The intention of the Act is that there shall be no extension of time in cases of continuing nuisance: *Darley Main Colliery Co.* v. *Mitchell* (7); *Lloyd* v. *Wigney* (8); *Carey* v. *Bermondsey Corporation* (9); *Markey* v. *Tolworth Joint Isolation Hospital Board.* (10) The Act of

(1) [1891] 3 Ch. 527.
(2) (1879) 12 Ch. D. 102.
(3) [1892] A. C. 345.
(4) (1788) 2 T. R. 667; 1 R. R. 585.
(5) (1869) L. R. 4 C. P. 739.
(6) (1873) L. R. 8 Q. B. 161–173.
(7) (1886) 11 App. Cas. 127.
(8) (1830) 6 Bing. 489; 31 R. R. 474.
(9) (1903) 67 J. P. 111.
(10) [1900] 2 Q. B. 454.

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1893 applies to actions for nuisance: *Chapman, Morsons & Co.* v. *Auckland Union.* (1) The nuisance cannot be traced to anything we have done. At all events, the plaintiffs cannot recover damages from us for the whole of the injury when it is shewn that we can only be responsible for a small part of it. There cannot be an injunction, for we are not threatening or intending to continue the pollution. We are doing all we can to stop it.

Macmorran, K.C., in reply. The private Act of 1825, which authorized the construction of sewers, did not give the commissioners permission, although it did not forbid them, to turn sewage into the river. The commissioners made outfalls under the Public Health Act, 1848, ss. 41, 43, 45. By s. 46 they had to clean their sewers and empty them so as not to create a nuisance.

It does not matter whether individual inhabitants have acquired prescriptive rights; the corporation cannot do so. Sect. 19 of the Act of 1875 in effect repeats s. 46. The defendants are bound to provide such a discharge for the sewage as that no nuisance will be created (s. 27): *Pasmore* v. *Oswaldtwistle Urban Council* (2); *Durrant* v. *Branksome Urban Council.* (3) They must not use their sewers so as to cause a nuisance, whether those sewers were made under that Act or not (s. 17).

Contamination even for very many years will not give prescriptive rights: *Goldsmid* v. *Tunbridge Wells Improvement Commissioners.* (4) Even if the corporation could have obtained a right by prescription to pollute the river, which we deny, for it was forbidden by the statutes, it would not authorize them to increase the pollution. Nor can a private inhabitant of Derby have a prescriptive right to turn drains into the defendants' sewers so as to create a nuisance if it is forbidden by statute. The burden of an easement cannot be increased.

[BUCKLEY J. This is nuisance, not easement. Even if I

(1) (1889) 23 Q. B. D. 294.
(2) [1898] A. C. 387.
(3) [1897] 2 Ch. 291.
(4) (1865) L. R. 1 Eq. 161; and on appeal (1866) L. R. 1 Ch. 349.

can restrain them from continuing recent pollution, that does not enable me to interfere with the old pollution.]

The old jurisdiction of the Court is not ousted: *Glossop* v. *Heston and Isleworth Local Board.* (1) The cases only shew that if the defendants have simply inherited the sewers and done nothing themselves we cannot sue them: *Attorney-General* v. *Dorking Union.* (2) Here the defendants have done more than that, and we can sue them for the whole of the nuisance. Our claim is for misfeasance as well as for non-feasance.

The defendants in 1872 succeeded to and are in the same position as the old local board: s. 9 of the Public Health Act, 1872. It is admitted that the old local board constructed some of these outfalls. We could have got an injunction against the old local board to restrain them from polluting the river. Since they have been in office the defendants have very largely increased the amount of sewage turned into the river by making new drains and by exercising the powers conferred by s. 36 of the Act of 1875: *Nicholl* v. *Epping Urban Council.* (3)

Before 1872 there was no nuisance. It was the increase of the sewage which caused the nuisance of which we complain. That takes the case out of *Glossop* v. *Heston and Isleworth Local Board* (1) and *Attorney-General* v. *Dorking Union.* (2) The difference between a drain and a sewer is shewn by *Beckenham Urban Council* v. *Wood.* (4) It makes no difference whether it is laid down by a local authority or not.

Sect. 299 of the Act of 1875 does not touch the duty of a local authority to use diligence in the management of existing sewers under ss. 17 and 19: *Baron* v. *Portslade Urban Council.* (5) Therefore that section does not apply to us. It refers only to breaches of s. 15: *Dent* v. *Bournemouth Corporation* (6); *Gibbings* v. *Hungerford.* (7) So we are justified in bringing this action: *Attorney-General* v. *Birmingham Borough*

(1) 12 Ch. D. 102, 116.
(2) 20 Ch. D. 595.
(3) [1899] 1 Ch. 844.
(4) (1896) 60 J. P. 490.
(5) [1900] 2 Q. B. 588.
(6) (1897) 66 L. J. (Q.B.) 395.
(7) [1904] 1 I. R. 211.

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Council (1); *Glossop* v. *Heston and Isleworth Local Board* (2); *Attorney-General* v. *Dorking Union*. (3)

We are entitled to damages for the interference with the lake.

[BUCKLEY J. Only for the expense to which you have been put. Not for interference with your convenience.]

All nuisances are interferences with comfort. The defendants had no right to compel us to give up taking the water.

The Public Authorities Protection Act, 1893, s. 1, sub-s. (*a*), means that when an injury is going on continuously an action may be brought whilst the injury continues, and within six months of the time when the injury ceases, for the whole injury done. It does not mean that a separate action must be brought within six months of the time when each act was done: *Carey* v. *Bermondsey Corporation*. (4) The cause of action continues from day to day. The intention of the Act was to avoid multiplicity of actions; not to deprive the injured party of his right of action. Therefore our claim for damages is only limited by the Statute of Limitations, i.e., to six years before action brought.

Cur. adv. vult.

Dec. 3. BUCKLEY J. read the following judgment:—For many years past, and for aught I know since sewers were first laid, the sewage of the borough of Derby as that borough existed before 1877, and as extended in that year, and as again extended in 1901, has been discharged in a crude state without purification or treatment of any kind into the river Derwent. The discharge is by certain outfalls, of which I may dismiss two with but few words. The one is the Midland Railway outfall, which is not vested in the corporation and is the outlet of drains which come only from the premises of the Midland Railway. This outfall to some extent no doubt, but exactly to what extent I am unable to say, contributes to the pollution of the river. The other, the Markeaton Brook, is of little importance. It seems to be a brook rather than a sewer, and brings

(1) (1858) 4 K. & J. 528.
(2) 12 Ch. D. 102.
(3) 20 Ch. D. 595.
(4) 67 J. P. 111.

down no sewage, or at most the drainage of a very few houses. By the remaining outfalls the whole sewage of the borough is discharged, as I have said, into the river. These outfalls were all made more than twenty years ago. The sewage thus discharged has for many years polluted the river. The pollution has been, from at least the year 1872 onwards, a continually increasing pollution. As the population of the borough has increased, as new connections have been made to previously existing sewers, as new sewers have from time to time been laid, and as privies have from time to time been converted into water-closets, the volume of the sewage and the pollution of the river have continually increased.

The plaintiffs are the legal owners, and the plaintiff Lord Harrington is the equitable tenant for life of the Elvaston castle and estate lying by the course of the river some five and a half miles below Derby. The estate extends in places along both banks, and in other places along one bank only of the river. There has existed for many years an intake from the river a short distance above the castle, which, after a short course, brought water from the river into an ornamental lake lying at a short distance from the castle. The outflow from the lake passed along another channel again into the river some distance below. At the outlet of the lake Lord Harrington and his predecessors in title have for many years had a waterwheel, for which the power was obtained from the water which came in at the intake and flowed out at the lower end of the lake. It was used to pump water from an adjacent well into a tower at the castle and, I believe, another receptacle. This water was used for all purposes of water supply to the castle, stables, gardens, and appurtenances. The plaintiffs say that the defendants, the corporation of Derby, have polluted the river, and ask, first, an injunction to restrain them from polluting the river so as to cause a nuisance to the castle and estate; secondly, a mandatory injunction to compel them to do certain works of cleansing and removal of foul matter from the plaintiffs' lands; and, thirdly, damages for injuries done by the pollution of which they complain.

As regards the pollution, the evidence is that it exists in a

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very great degree. The defendants say that the river when it reaches Derby is already in a polluted condition. I need say no more about this, for the evidence of their own witnesses is that this pollution, so far as it exists, will have become innocuous and have disappeared altogether before the stream reaches the plaintiffs' lands. The pollution of which the plaintiffs complain is not attributable to anything done above the borough of Derby. The results of the pollution, quite shortly stated, have been that, in the latter half of the decennial period ending in 1890, the pollution in the river and in the lake became so great that the fish in the river below Derby and in the lake died, and were found floating in the water coated with slime, and in or about 1893 to 1897 Lord Harrington was removing cartloads of fish killed by the pollution; that somewhere about the same time (say 1895) the water weeds in Lord Harrington's intake from the river died, and the weeds in the lake died, and that while water weeds may flourish upon a small amount, they are killed by a large amount of sewage pollution; and that about the same time the water in the lake became so fetid and foul that residence at the castle became not only unpleasant, but to a large extent dangerous. Dr. Barwise, medical officer for the county, who had been subpœnaed in this action by both sides and had given no proof to either, has proved what he found to be the state of facts in October, 1903, and I can best give it in his own words. He says: "In consequence of a complaint from Lord Harrington, I paid a visit to Elvaston Castle and obtained samples of the water used for dietetic purposes. The water is obtained from the lake in front of the castle, which, in its turn, is supplied by a feeder from the river Derwent. At the time of my visit the water being pumped up to the castle positively stank. There were hundreds of dead fish (chiefly tench) floating on the lake; in fact, there were so many close to the pumping station that there was a most offensive smell for twenty yards around. The sides of the lake and its feeder were covered with black stinking mud, and the water was bubbling with putrefaction. I followed the feeder up to the Derwent and saw pieces of excreta floating by. There is no other water available for drinking purposes, and owing to the presence of a

case of cholera in Derby, and the castle being only 100 yards from the lake, in reply to the question put to me, I could only give the opinion that it was not, under the circumstances, safe to live there." That report is dated October 20, 1893.

The state of pollution at the present day, taking the evidence of Mr. Hehner (who gave his evidence most fairly) and of Dr. Howarth, who were both called for the defendants, is that the water at the intake is seriously polluted with sewage, with the result that the lake had become in a filthy and almost dangerous state, to which the sewage contributed, and, according to Dr. Howarth, that at times of low river and of the first flood water the pollution at the intake is gross—meaning by that, not merely that it is not fit to drink, but that it is so foul as not to be fit for impounding in a lake. Mr. Hehner, as regards the condition of impurity of the water at the intake, says that it is seriously polluted with sewage. At normal times he puts it as being with few exceptions of such purity, or rather impurity, as the Thames Conservators will treat as being sufficiently good for the admission of a sewage effluent into the Thames. In other words, it does not approach at all to a proper condition of purity for a flowing river, but at most to such a condition as may be accepted for an effluent sewage discharge into a flowing river for the purpose of being mixed with a much larger volume of water and thus rendered innocuous. The lake, he says, was in a filthy, almost putrid, state.

In 1898 the county council obtained from the county court an order under the Rivers Pollution Prevention Acts of 1876 and 1893, which I need not read at length, but which ordered the corporation to abstain from polluting the river. As regards obtaining that order, Lord Harrington says that he thinks he most likely instigated the county council in the matter, and that he would have taken action if they had not. That order gave the corporation time until December 31, 1902, to do what was required. That time has been since twice extended, and the second extension will expire, I am told, on January 1, 1906.

As long ago as the year 1872 the then Earl of Harrington, father of the present Earl, commenced, and the present Earl upon succeeding in 1881, continued, to make repeated complaints

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and protests to the defendants against the grievous state of things which existed in the river. From the long correspondence which has been read in the case I extract the following by way of summary sufficient for my purpose, and taken roughly at successive intervals of ten years: On June 10, 1872, the mayor stated that the subject of the sewage of Derby would receive attentive consideration, and asked that the matter might be permitted to remain in abeyance for the present. The local authority continued that request upon several occasions. On December 18, 1873, they stated that they were awaiting reports and the results of proposed legislation with a view to taking advantage of them. On June 1, 1883, they stated that attention was being given to a comprehensive scheme of drainage for the borough, and on December 17, 1883, that no time would be lost in bringing before the corporation a scheme for adoption. On April 9, 1892, the town clerk wrote that Sir Frederick Bramwell was engaged upon a report upon the matter; and again, on July 12, 1892 (in a letter in which he had the courage to say that Lord Harrington was "taking up a very peremptory position"), that the corporation were making experiments and had retained Sir Frederick Bramwell and Mr. Harris, and were acting under their advice. On August 11, 1892, the town clerk refused to give Lord Harrington any definite assurance in the matter, but stated that no definite time could be fixed until the Lockwood process had been tested and so on. On October 4, 1894, he wrote that the committee had received the report of Sir Frederick Bramwell and Mr. Harris, and had it under consideration. Shortly stated, the effect of the correspondence is that the repeated complaints made and great forbearance shewn by Lord Harrington and his father were met with repeated promises or assurances that something would be done, but that nothing in fact was done by the defendants to remedy the state of things which existed. Ultimately, in 1898, the order of the county court was obtained. In 1901 the corporation obtained an Act giving them certain statutory powers to deal with the sewage. The intended works under the order of 1898 had not been, and I dare say could not be, constructed and

finished by 1902, and in July of that year Lord Harrington found it necessary to close, and did close, the source by which the water of the river flowed into the intake of his lake. The result was that the water power which was employed to pump water for his house was destroyed. He had, therefore, to supply power for that purpose, and built an engine-house, put in an engine and a new pump, which upon the evidence was the most reasonable and cheapest way of meeting the difficulty of the destruction of the water power which he had previously enjoyed. On July 29, 1902, in view of the closing of the sluice and the cutting off the water, Lord Harrington's solicitors wrote that he would hold the corporation responsible for the expense to which he was put in connection with the new pumping apparatus and making new watering-places for his tenants' cattle. To this, on August 16, 1902, the town clerk replied that the corporation "cannot accept any liability in the matter." In the result the writ in this action was issued on December 18, 1902.

I will first deal with the question whether the plaintiffs can obtain the injunction which they ask to restrain the defendants from polluting the river so as to cause the river to be a nuisance to them. For this purpose it is necessary to bear in mind that the sewage which is now polluting the river may come from any one of four sources of origin—namely, (1.) from sewers constructed many years ago into which householders have for more than twenty years discharged their sewage; (2.) from sewers not laid by the corporation, but which became vested in the corporation when they became the sanitary authority, into which householders have by virtue of their statutory rights made connections; (3.) from sewers laid by the corporation; and (4.) from additional sewage arising from the conversion of privies into water-closets under directions given by the corporation for that purpose. As regards the first class it is, I think, settled by authority that persons who have discharged their sewage for more than twenty years have obtained a prescriptive right: *Glossop* v. *Heston and Isleworth Local Board* (1); *Attorney-General* v. *Dorking Union* (2); *Reg.* v. *Staines Local*

(1) 12 Ch. D. 102, 111. (2) 20 Ch. D. 595, 601.

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Board (1); *Brown* v. *Dunstable Corporation*. (2) It is true that this prescriptive right is not that of the defendants, but of persons who use the sewers of the defendants; but it would be impossible, I think, to grant an injunction which would interfere with those prescriptive rights. The corporation have in fact, as was decided in *Attorney-General* v. *Dorking Union* (3), only a limited ownership in the sewers, and are not in the same position as a private individual would be, because they have in many cases no power to prevent householders from using them; and when they have power, a landowner cannot obtain an injunction against them by reason of the fact that they could in turn obtain an injunction against the householder. It would be impossible, therefore, to grant an injunction which should extend to sewers of the first class, for the Court will never enjoin a defendant unless it is satisfied that the party enjoined can obey the order. Similar considerations apply to sewers of the second class. The sewers of the first and second classes are a constituent contributing to the total volume of sewage which is discharged through the outfalls; and if an injunction cannot be granted as regards the first and second classes, it is, I think, physically impossible or practically impossible for the defendants to comply with an injunction, if an injunction were granted as to the sewers of the other two classes. This seems to be a first ground why an injunction cannot be granted. But further, as regards the last two classes: so soon as the corporation have made new sewers, or have permitted or directed connections into them, or conversions of privies into water-closets with consequent discharge of further sewage, there have arisen, as it seems to me, rights in individuals, under the statutes, to continue to discharge through the sewers which in fact have been constructed. An injunction could, no doubt, be granted to restrain the corporation from constructing further sewers so as to pollute or increase the pollution, but it is not shewn that they are doing so. Neither the rights of the parties nor the circumstances of the case seem to me to allow of an injunction which shall restrain the defendants as regards

(1) 60 L. T. 261. (2) [1899] 2 Ch. 378.
(3) 20 Ch. D. 595.

any sewers which have been constructed. These reasons are sufficient, I think, to shew that the plaintiffs cannot obtain an injunction. But there are further grounds upon which I should be of opinion that an injunction ought not to be granted, supposing that it were possible to grant it. First, under the Rivers Pollution Prevention Acts the plaintiff, Lord Harrington, as a person aggrieved could obtain protection, not only as regards sewage which the defendants cause to fall or flow, or knowingly permit to fall or flow, into the river, but also under the Act of 1893 as regards sewage which in fact falls or flows or is carried into the river after passing through the sewers of the corporation, so that a larger protection than otherwise might be possible is afforded under those Acts, and in point of fact by the order of 1898, which was obtained with the knowledge and at the instigation of the plaintiff, he has obtained such protection, and that protection is on its way to be given by the construction of works as to whose efficiency I have not to inquire in this action. Under these circumstances I should be slow to grant an injunction which would or might give him protection a second time, but a protection less, it may be, than has already been obtained under the order of 1898. Further, as a third ground, I think that in the exercise of its discretion the Court would not grant an injunction upon the footing that the defendants are threatening and intending to continue the pollution, when in fact they stand in a position in which by the statutes which govern them they are precluded from closing the sewers, and are in fact taking steps to remove the cause of the pollution. For these reasons I think no injunction against pollution should be granted.

Secondly, as regards the mandatory injunction which is asked, it seems to me that—and I think the plaintiffs' counsel conceded that—such a mandatory order is impossible. It is an order upon the defendants to go on the plaintiffs' land and do certain things there by way of removing an injury. The proper remedy (if any) in respect of this matter is in damages.

It remains, then, to consider, as regards the subject-matter of this mandatory injunction and the other matters in respect of which damages are sought, whether the plaintiffs can

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obtain, and under which of the heads on which they rely, damages against these defendants. The plaintiffs argue that to throw sewage into the river so as to cause a nuisance is an illegal act, and that the defendants are consequently liable in damages for all the pollution which is caused by the total volume of sewage which is discharged into the river. They rely for the purpose of this argument upon ss. 15, 17, and 19 of the Public Health Act, 1875. The defendants are liable, they say, generally for causing sewage to be discharged into the river, and for not keeping their sewers so as not to be a nuisance—liable not for misfeasance only, but for non-feasance also.

It was decided, however, in *Robinson* v. *Workington Corporation* (1) and *Pasmore* v. *Oswaldtwistle Urban Council* (2) that the remedy for neglect of the duty imposed by s. 15 of the Act is that given by s. 299—that the neglect of their duty does not give a right of action to an individual whose property has been injured. The plaintiffs contend, however, that ss. 17 and 19 of the Act of 1875 create rights in respect of which they are entitled to a remedy against the corporation in respect of all the sewers belonging to the corporation or which the corporation use, and that s. 299 does not apply to that case. But first, as regards s. 17, it was decided in *Glossop* v. *Heston and Isleworth Local Board* (3) and *Attorney-General* v. *Dorking Union* (4) that s. 17 is to be read simply as a proviso, and that its effect, in the words of Cotton L.J., is only this—that if the local authority "want, for the purpose of doing anything, to rely upon authority given by the Act, they must do that thing so as not to commit a nuisance." The section, says Cotton L.J., "does not mean that the local authority are to be considered as themselves using, either by themselves conveying, or by granting permission for sewage to be conveyed, into the stream by means of the sewer" which they did not construct. It has only the effect which I have stated. As regards s. 19, it was

(1) [1897] 1 Q. B. 619.
(2) [1897] 1 Q. B. 625; [1898] A. C. 387.
(3) 12 Ch. D. 102.
(4) 20 Ch. D. 595, 609.

decided in *Baron* v. *Portslade Urban Council* (1) that s. 299 does not apply to cases within s. 19; but my observation upon that case and upon s. 19 itself is this—that what was there dealt with was the physical construction or condition of the sewer as such. The plaintiffs' complaint in this section is not that the sewers are foul (by which I mean that the sewer as a sewer is not clean or not properly ventilated or the like), but is that from the user of the sewer, whether the sewer itself be clean or unclean, properly or improperly ventilated, there is discharged an effluent which so pollutes the river as that he suffers injury five miles below. In my opinion s. 19 is not addressed to that case. Mr. Macmorran relies upon the words that the sewers shall be "kept so as not to be a nuisance." This does not, I think, mean or include the case where the sewer complained of is so used as that a filthy discharge in excess of the purifying influences of the volume of the water in the river causes pollution at a point lower down the river.

It has further been decided that damages cannot in such a case be recovered upon the ground of non-feasance as distinguished from misfeasance. Thus in *Glossop* v. *Heston and Isleworth Local Board* (2) James L.J. says: "The only case the plaintiff has alleged or attempted to prove is that he has not been relieved from a damage to which he was subject before this body were called into existence in the way he hoped to be, and as he would be if they had done their work in draining this district." And in *Attorney-General* v. *Dorking Union* (3) Cotton L.J. says: "Here they are doing nothing, they are not constructing a new system of sewers. It was said that they are in fact using this sewer by allowing it to be used as part of the existing system of drainage which is vested in them. That is, they are not substituting a new system of sewerage, and in my opinion the mere fact that they have not substituted a new system of sewerage cannot make this the using of the sewer by them when it is used without any leave granted by them under the rights which are granted by the Act to householders." And in *Cowley* v. *Newmarket*

(1) [1900] 2 Q. B. 588. (2) 12 Ch. D. 102, 117.
(3) 20 Ch. D. 595, 609.

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Local Board (1) Lord Herschell says that he doubts "whether the broad general proposition can be supported, that whenever a statutory duty is created any person who can shew that he has sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed."

In my judgment the defendants are liable in damages only for such acts as they have done, and which have occasioned the pollution by which the plaintiffs are injured. They are liable in damages for that which they have done, but not for that which they ought to have done but have failed to do. This being so I must, I think, confine my attention to cases in which either (1.) the corporation has laid new sewers, or (2.) has invited or permitted householders to make new connections with the sewers of the corporation, or (3.) has permitted or required the conversion of privies into water-closets so as to increase the volume of sewage. No exact evidence has been adduced to shew what proportion of the total discharge of sewage into the river is attributable to these causes. But both parties agree that they have put before the Court such evidence as there is, and that it would be practically impossible to ascertain what is the exact amount of new sewers, new connections, and so on which would lead to the answer to the above question. Minutes have been referred to by which I am satisfied that the corporation have, to a very large extent within the last twenty years, laid new sewers and required conversion of privies into water-closets, and procured new connections to be made. I have also the evidence of Mr. Ward that, in the period to which he can speak, namely, from 1898 to 1902, the corporation laid about a mile or a little more of new sewers, made up of many different lengths, although some of those were replacement of old sewers. I have further the fact that the population of Derby in 1881 was 81,470, and is now roughly about 120,000, being an increase of, say, about 50 per cent. Upon these materials both parties concur in asking me to act, as being the best available materials for assessing the damages so far as this point is concerned.

(1) [1892] A. C. 345, 352.

As regards the several heads of damage, they are as follows: First, the plaintiff says the pollution of the water of the river flowing by the intake into the lake has so fouled the lake that it must be cleaned out, and he measures his damage by the cost of cleaning out the lake. I think this is wrong. In the first place, the silting up of the lake is due largely—very largely—to the deposit of suspended matter which is brought down by the Derwent, which comes from the higher parts of Derbyshire, and in times of flood rises rapidly and brings down a large quantity of suspended matter. The corporation are not responsible for this. It is due further in part to vegetable matter from the leaves of the trees and hedges which have fallen into the water, and to the decay of the water weeds and so on in the lake. To a comparatively small extent the silting up is due to the deposit of sewage pollution. No doubt the sewage pollution has acted so as to render more acute a fetid condition which would have resulted in a less degree from the gradual accumulation of decaying vegetable matter mixed with the deposit brought down by the river in flood. The lake was last cleaned out in 1867. It is now very much silted up and requires to be cleaned out again. To say that the whole of the expense of so doing is damage caused by the pollution of the river is, to my mind, extravagant. Further, the plaintiffs are entitled to the inflow, at their intake, of pure water; but if, as the fact was, they knew that the water was impure, their remedy was to exclude it, and to claim damages for the loss which they sustained by not enjoying the supply. They cannot have as legal damages the expense to which they have been put by taking water which they knew to be impure. They can have as legal damage the expense to which they have been put by procuring by other means a supply of pure water in the place of that of which the wrongful act of the defendants had deprived them. But, secondly, when the plaintiffs were by reason of the pollution driven to close the intake in 1902 they lost the water power which enabled them to pump the water for the supply of the house. Such loss as has resulted therefrom is, in my opinion, recoverable as good legal damages. The plaintiffs were entitled to the flow of pure water. Had

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they had it they would have enjoyed the water power. The defendants' act rendered it necessary for them to cut off that intake. The loss which they have thus sustained is, in my opinion, attributable to the defendants' wrong. Thirdly, the water of the river was used for watering cattle and horses belonging to the Earl or his tenants in the meadows adjoining the river. The pollution of the river has rendered it necessary to take other means for watering them. This is, I think, good ground for damages. Fourthly, the Riverside House, lying at Borrowash on the river, has depreciated. There is a contest of fact upon this as to whether the depreciation of rental value was due in part at least to the defective water supply (which was taken from the adjacent canal), or to the bad state of repair of the premises, or whether it was due to the foul state of the river, or to what extent it was due to any and which of these causes. I think the result of the evidence is that the condition of the river has played a large part in the depreciation of the value of that property. As regards the want of repair, the house was offered to a tenant upon the terms that the lessor would put it in repair. At any rate, some damages, I think, are recoverable in respect of this house. Fifthly, the plaintiff claims damages in respect of injury to the amenities of the castle by the fouling of the lake. There is no legal damage under this head. The Earl has never wished to let the place, and no pecuniary damage is attributable to the fact that the castle by loss of the lake became disagreeable as a residence. Sixthly, damages are recoverable, I think, to the proper figure, whatever it is, in respect of the injury to the fishing in the river and the lake. I think I have now travelled through the principal heads of damage.

The defendants contend that, having regard to s. 1 of the Public Authorities Protection Act, 1893, the plaintiffs can recover damages for no longer period than six months before the issue of the writ. To determine this point it is necessary to ascertain the meaning of the words in the section, "in case of a continuance of injury or damage." It cannot be disputed that for one cause of action all damages incident to it must be recovered once, and once only; so that, for instance,

if by the removal of the soil the defendant causes the walls of the plaintiff's house to crack, the plaintiff's cause of action is one, and one only, and that none the less because the house does not at once shew all the damage done to it, but manifests subsequently by degrees that the damage had been done. Upon this *Lloyd* v. *Wigney* (1) was cited, being a case upon the words of an Act which provided that an action must be brought within six calendar months "after the thing done." But if the result of the act is that one damage is done to-day and another subsequently, there is nothing to prevent a fresh action toties quoties fresh damage is inflicted: *Darley Main Colliery Co.* v. *Mitchell.* (2) If as the result of an act done to-day damage results a year later, the cause of action arises, not at the date of the act, but a year later when damage results. No cause of action arises from the act if it, at that date, created no damage. The right of action arises, not from the act, but from the resulting of damage from the act. *Backhouse* v. *Bonomi* (3) established that proposition. There is, however, a further case with which this section is particularly concerned, namely, a continuing act which produces subsequently from day to day a recurrent damage. There is thus created within the principle which I have stated a fresh cause of action every day, and this, I conceive, is what is referred to in the section by the words "in case of a continuance of injury or damage." The words do not mean or refer to a damage inflicted once and for all which continues unrepaired, but a new damage recurring day by day in respect of an act done, it may be, once and for all at some prior time, or repeated, it may be, from day to day. In such a case there is what Channell J. in *Carey* v. *Bermondsey Corporation* (4) calls a continuing cause of action. Where this is the case I think that, within s. 1 of the Public Authorities Protection Act, an action will lie when instituted six months next after the ceasing of the continuing injury or damage. That is, I think, the present case. These plaintiffs are therefore, I think, entitled to recover for a greater period than six months,

(1) 6 Bing. 489; 31 R. R. 474.
(2) 11 App. Cas. 127.
(3) (1861) 9 H. L. C. 503.
(4) 67 J. P. 111.

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and up to the period of six years limited by the Statute of Limitations.

The damage which the plaintiffs have in fact sustained is, under the circumstances which I have stated, attributable partly to acts for which the defendants are not, and partly to acts for which the defendants are, responsible. It is also attributable partly to the Elvaston outfall, which is not complained of in this action, and partly to the Midland Railway outfall, for which the defendants are not responsible. In assessing the damages recoverable against them I have borne these points in mind. I am conscious that without a more exact knowledge of the extent to which the defendants have by acts of their own, as distinguished from acts of non-feasance, contributed to the pollution, the question of the proper amount of damages is not capable of any exact solution. Both parties, however, have concurred in asking me to assess the damages upon the materials before me, being, as they say, the best which in fact can be obtained. After giving the best consideration I can to the evidence before me, and all the circumstances of the case, I think the plaintiffs are entitled to substantial damages, and I assess them at 500*l*. I have considered whether the fact that the plaintiffs have not succeeded in obtaining the injunction which they have asked ought to affect the costs of the action. I think not. I give judgment against the defendants for 500*l*. and the costs of the action.

Solicitors: *Walfords; Sharpe, Parker, Pritchards, Barham & Lawford.*

H. C. R.

In re THOMPSON'S SETTLEMENT TRUSTS. THOMPSON *v.* ALEXANDER.

[1903 T. 1658.]

SWINFEN EADY J.

1904

Nov. 19, 30.

Trustee—Power to appoint New Trustees—Appointment of Corporation jointly with Individual—Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 *Vict. c.* 20).

A marriage settlement contained a proviso that, if the trustees thereby constituted or either of them, or any trustees or trustee thereby appointed, should die . . . . it should be lawful for the husband and wife to appoint a new trustee or new trustees in the place of the trustee or trustees so dying. One of the trustees having died, the husband and wife proposed to appoint a corporation to be new trustee jointly with the surviving trustee:—

Held, that since the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), had enabled corporate bodies to hold property in joint tenancy with individuals, the appointment could legally be made under the power.

By a settlement dated December 5, 1866, made on the marriage of Arthur Kelly Thompson and M. E. Thompson his wife, certain leasehold property and chattels were assigned to Samuel Thompson and George Caledon Alexander upon trust for sale, and to hold the proceeds upon the usual trusts for the husband and wife for their lives, and afterwards for the children of the marriage.

The settlement contained a power to appoint new trustees in the following form: "If the trustees hereby constituted or either of them or any trustees or trustee appointed as hereinafter provided shall die or be abroad or desire to be discharged or refuse or become incapable to act then and in every such case it shall be lawful for the said A. K. Thompson and M. E. Thompson or the survivor of them and after the death of such survivor for the surviving or continuing trustees or trustee for the time being or for the acting executors or executor administrators or administrator of the last surviving trustee to appoint a new trustee or new trustees in the place of the trustee or trustees so dying or being abroad or desiring to be discharged or refusing or becoming incapable to act as aforesaid and upon every or any such appointment the number of

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trustees may be augmented or reduced (but so that in no case shall the number be less than two) and upon every such appointment the trust property shall (if and so far as the nature of the property and other circumstances shall require or admit) be transferred so that the same may be vested in the trustees or trustee for the time being."

Samuel Thompson died on April 12, 1904.

This summons was taken out by Arthur Kelly Thompson and his wife for the determination of the question whether the power above set out authorized or enabled them to appoint the Ocean Accident and Guarantee Corporation, Limited, or any other corporation to be a trustee jointly with the surviving trustee, G. C. Alexander.

The defendants were the surviving trustee and one of the children of the marriage.

George Lawrence, for the summons. The short question is whether an appointment out of Court of a limited company to be trustee jointly with another can be good.

I submit that the appointment can be made under the power in the settlement. It is settled law that a corporation may be a trustee, and the power is to appoint a trustee or trustees, not, as it is in many cases, to appoint a person or persons to be a trustee or trustees.

There was formerly a difficulty because an individual and corporation could not hold property in joint tenancy, and on this ground the Court in *Law Guarantee and Trust Society* v. *Bank of England* (1) refused to compel the bank to register Consols in the joint names of a corporation and an individual. This difficulty was removed so far as Consols were concerned by the National Debt (Stockholders Relief) Act, 1892 (55 & 56 Vict. c. 39). But the Bodies Corporate (Joint Tenancy) Act, 1899, goes further, and enables a corporation and an individual to hold any kind of property as joint tenants. (2)

(1) (1890) 24 Q. B. D. 406.

(2) 62 & 63 Vict. c. 20, s. 1: "(1.) A body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual, or two or more

In *In re Brogden* (1) North J. thought he had no power to appoint a corporation trustee, but the Act of 1899 removes the only objection.

Even if the applicants cannot make the appointment under the power in the settlement, the continuing trustee could make it under s. 10 of the Trustee Act, 1893, for that section enables them to appoint "any person or persons," and by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19, it is provided that "in every Act passed after the commencement of this Act the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate." *In re Wheeler and De Rochow* (2) is an authority that the power in the statute may be used where the power in the instrument is deficient.

W. E. Hollams, for the defendants, supported the application.

Cur. adv. vult.

Nov. 30. SWINFEN EADY J. The question raised by this summons is whether, in the events which have happened, the plaintiffs may lawfully appoint the Ocean Accident and Guarantee Corporation, Limited, to be a trustee of the settlement dated December 5, 1866, made upon the marriage of Mr. and Mrs. Arthur Kelly Thompson, to act jointly with Mr. George Caledon Alexander, the surviving trustee of that settlement. The settlement contains a provision that if either of the trustees should die, it should be lawful for the husband and wife "to appoint a new trustee" in the place of the trustee so dying, and they now desire to appoint the Ocean Company. Undoubtedly corporations may be trustees. In *Attorney-General* v. *Landerfield* (3), where a testator had devised real

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bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint tenancy, they shall be entitled to the property as joint tenants. . . .

"(2.) Where a body corporate is joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant."

(1) [1888] W. N. 238.

(2) [1896] 1 Ch. 315.

(3) (1744) 9 Mod. 286.

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estate to St. Bartholomew's Hospital, the Attorney-General argued that, as corporations could not be seised to a use at law, no more could they be trustees, but should have the lands to their own use, divested and freed from the trust; but the report states that the Lord Chancellor (Lord Hardwicke) would not let him go on, nothing being clearer than that corporations might be trustees. And that the Court of Chancery (now the Chancery Division) will enforce and execute the trusts on which corporations hold property, whether lay or ecclesiastical, was established by *Attorney-General* v. *St. John's Hospital, Bedford.* (1) Until recently there was a difficulty in a natural person being a trustee jointly with a corporation, as a corporation and a natural person could not hold property as joint tenants, but only as tenants in common: Co. Litt. 190 a; Williams's Saunders (ed. 1871), vol. ii. 716 (note 1); *Law Guarantee and Trust Society* v. *Bank of England.* (2) The law in this respect has, however, been altered by the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), which provides that a body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument, which would, if the body corporate had been an individual, have created a joint tenancy, they shall be entitled to the property as joint tenants. This provision is much more comprehensive than that contained in the National Debt (Stockholders Relief) Act, 1892 (55 & 56 Vict. c. 39), s. 6, which provides that stock may be transferred to and held in the names of an individual and a body corporate, or of two or more bodies corporate, and any such holding shall, in its relation to the bank, be deemed a joint tenancy. Under the Act of 1899 a joint tenancy is actually created, and the incidents of a joint tenancy will follow as far as may be. A limited liability company may be wound up and dissolved, but the Act of 1899 provides that

(1) (1865) 2 D. J. & S. 621, 635. (2) 24 Q. B. D. 406.

where a body corporate is joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant. The plaintiffs' settlement contemplates that the trustees of it shall be able to take and hold lands, and this a limited company can do, without licence in mortmain, under s. 18 of the Companies Act, 1862. For these reasons I am of opinion that there is not any legal objection to the plaintiffs' appointing the Ocean Accident and Guarantee Corporation, Limited, to be a trustee of their marriage settlement jointly with the continuing trustee.

Solicitors: *Hollams, Sons, Coward & Hawksley.*

J. R. B.

In re CHAYTOR. CHAYTOR *v.* HORN.

[1904 C. 2469.]

Will—Construction—Tenant for Life and Remainderman—Capital or Income—Conversion—Power to postpone Conversion—"Residuary Trust Funds"—Unauthorized Securities—Wasting Securities—Enjoyment in Specie.

The testator devised and bequeathed all his real and personal estate not by his will otherwise disposed of to trustees upon trust to sell and convert the same, with power to postpone conversion as long as the trustees thought proper and to retain any investments subsisting at his death, whether of the kind thereinafter authorized or not, and out of the proceeds to pay debts and legacies, and at the discretion of the trustees to invest the residue and to stand possessed of the residuary trust moneys and the investments for the time being representing the same (thereinafter called "the residuary trust funds") in trust to pay the income thereof to his wife during her life.

At the time of his death the testator was possessed of preference and ordinary shares in a coal-mining company. The ordinary shares, although not of a wasting character, were not authorized by the investment clause in the will. The trustees therefore sold some of them, and proposed to sell more on a favourable opportunity. They declined to pay to the widow in the meantime the full dividends on the ordinary shares thus retained:—

Held, that, in the absence of any express or implied gift of the income pending conversion, the widow was entitled only to interest at 3 per cent. on the value of the ordinary shares at the testator's death, and

WARRINGTON J.

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the rest of those dividends must be invested. This rule was well settled, and applied to unauthorized securities whether they were of a wasting character or not.

Bulkeley v. *Stephens*, (1863) 3 N. R. 105, dissented from.

ADJOURNED SUMMONS.

By his will dated July 23, 1895, D'Arcy Chaytor appointed executors and trustees and gave certain legacies. Clause 5 of his will was as follows:—

"I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto and to the use of my trustees upon trust to sell and convert into money the same with power to postpone such sale and conversion as long as my trustees shall think proper and to retain any investments subsisting at my death whether of the kind hereinafter authorized or not and out of the moneys produced by such sale and conversion and out of such part of my estate as shall consist of money to pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and at the discretion of my trustees to invest the residue of the said moneys with power for my trustees from time to time at their discretion to vary such investments and to stand possessed of the residuary trust moneys and the investments for the time being representing the same (hereinafter called "the residuary trust funds") upon the trusts following that is to say in trust to pay the income thereof to my said wife during her life if she shall so long continue my widow."

After her second marriage or death the trustees were to stand possessed of the residuary trust funds upon trusts for the benefit of the testator's children. Clause 11 was as follows:—

"All moneys liable to be invested under this my will may be invested in or upon any stocks funds or securities of or guaranteed by the Government of the United Kingdom or India or any British Colony or dependency or the United States of America or in or upon the bonds debentures or other securities or the debenture stock or preference or guaranteed or preferred stock of any railway or other public company in

the United Kingdom or in India or in any British Colony or dependency or in the United States of America or at interest upon the securities of any municipal or other corporation or public body in the United Kingdom or in any British Colony or dependency or in the purchase or upon mortgage of any freehold copyhold or leasehold property in the United Kingdom."

The testator died on July 23, 1903. At the time of his death he was possessed of (inter alia) 2670 ordinary shares of 10*l.* each fully paid of the South Hetton Coal Company, Limited, the mean officially quoted price of which on the day of the testator's death was 20½; also of 1602 preference shares of 10*l.* each fully paid in the same company quoted on the same day at 10¾.

The trustees were of opinion that they ought not permanently to retain these shares, and that it was their duty to realize them as opportunity offered for the best prices obtainable. Accordingly they sold 349 of the ordinary shares and 459 of the preference shares, and they proposed to sell the rest up to one-half of the number held by the testator by degrees. They alleged that the shares were of a speculative character, but did not assert that they were wasting securities.

The South Hetton Coal Company was incorporated in May, 1898, with the object of taking over the business of another company, purchasing, leasing, and acquiring mines, carrying on business as colliery owners, and doing many other things. The capital of the company was 1,000,000*l.*, divided into 50,000 ordinary shares of 10*l.* each and 50,000 preference shares of 10*l.* each. The company paid large dividends, held freehold and leasehold mines and other property, and had reserve funds amounting to 167,564*l.*

The trustees declined to pay to the widow the full dividends received in respect of the shares which they retained, and only paid to her such an amount as corresponded with what would have been produced by an investment in Consols of the sum which would have been realized if the shares had been sold at the testator's death.

Mrs. Chaytor took out a summons to determine the question

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whether the shares were such as the trustees were authorized to retain, and whether she was entitled to receive the dividends in full until conversion.

T. H. Carson, K.C., and *Waggett*, for Mrs. Chaytor. There is no gift in the will of the income of unauthorized securities before realization, and there is no express direction to the trustees to retain securities. But these are not wasting securities, although the ordinary shares are unauthorized. The South Hetton Colliery Company has freehold property and a large reserve fund, and there is no prospect of the shares falling in value. The preferred shares are "preference stock of a public company," and are authorized by the will: *In re Sharp*. (1) There is no doubt that the trustees have power to retain them, and that the widow is entitled to the whole of the dividends on them so long as they are retained.

[*Rowden, K.C.* We admit that.]

We have no desire to interfere with the discretion of the trustees. But we contend that on the construction of the will the whole income is given to the plaintiff. If it is not given to her it is not given at all, and the Court always looks with an expectant eye for a direction that the tenant for life shall receive the income: *In re Thomas*. (2) The gift here refers to the income of the investments for the time being representing the trust funds.

If there is no express gift there is an implied gift. The trustees are to convert the property; but they are allowed to postpone the realization of any part of it. They can retain these ordinary shares, which are unauthorized but not wasting. From that it must be implied that the whole of the income is given to the widow. A power of retention properly exercised has in the case of non-wasting securities the effect of giving to the tenant for life the whole income of those securities: *Bulkeley* v. *Stephens* (3); *In re Sheldon*. (4) "Properly exercised" means "exercised in the interests of the estate generally":

(1) (1890) 45 Ch. D. 286.
(2) [1891] 3 Ch. 482.
(3) 3 N. R. 105; also reported 10 L. T. 225.
(4) (1888) 39 Ch. D. 50.

Brown v. *Gellatly* (1); *Porter* v. *Baddeley*. (2) Those cases are to some extent against our contention; but they shew that property ought not to be converted simply for the benefit of the remaindermen. Decisions upon wasting securities do not apply to this question. These are unauthorized securities, and are in the same position as real estate which has not yet been sold under a trust for conversion; it is an unauthorized security, but the tenant for life gets the income of it: *Hope* v. *D'Hédouville* (3); *Casamajor* v. *Strode*. (4) There is an implied trust of the income for the tenant for life: *Spencer* v. *Harrison* (5); *Vigor* v. *Harwood*. (6) The rule in *Dimes* v. *Scott* (7) and *Brown* v. *Gellatly* (1) does not apply to non-wasting securities.

Rowden, K.C., and *Christopher James*, for the remaindermen. The tenant for life is only entitled to 3 per cent. on the value of the unauthorized securities computed as at the testator's death: *In re Woods*. (8)

The decision in *Bulkeley* v. *Stephens* (9) has never been cited as an authority for the proposition that wasting securities are for this purpose distinguishable from unauthorized securities. It is inconsistent with all the other authorities on the subject, and ought not to be followed.

[They were stopped by the Court.]

Sheldon, for the trustees.

WARRINGTON J. The question I have to decide is whether the tenant for life in this case is entitled in specie to the entire income of certain unauthorized securities which the trustees are retaining at present until an opportunity of conversion arises, or whether, under the trusts of the will which I have to deal with, she is only entitled to interest at a certain rate on the value of those securities. [His Lordship stated the facts, and continued:—]

I will get rid of one point at once. Some of the shares are preference shares, and it has been conceded that preference

(1) (1867) L. R. 2 Ch. 751.
(2) (1877) 5 Ch. D. 542.
(3) [1893] 2 Ch. 361.
(4) (1809) 19 Ves. 390, n.
(5) (1879) 5 C. P. D. 97, 102.
(6) (1841) 12 Sim. 172.
(7) (1827) 4 Russ. 195; 28 R. R. 46.
(8) [1904] 2 Ch. 4.
(9) 3 N. R. 105.

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shares of a company registered under the Companies Acts come within the definition "preferred stock of any . . . . public company" in clause 11 of the will. Therefore they are authorized securities, and it is well settled that under such provisions as those in this will the interest on them is properly payable to the tenant for life. So far the contention of the tenant for life is right.

As regards the unauthorized securities, there is no express gift of the income of the funds or items of property forming part of the testator's estate during postponement of conversion; but I am invited by Mr. Carson to find such a gift by construction in the will. In the first place, what is the general principle which is applied in such a case as this, where there is an express trust for conversion and a power to retain securities of every kind, authorized and unauthorized, and there is no express gift of the income pending conversion? As I understand it, the general rule is that the tenant for life is entitled to the income of authorized securities, but not entitled to the income of unauthorized securities. In the latter case he is only entitled to interest, which is now fixed at the rate of 3 per cent., on their value at the testator's death. That certainly was the rule adopted by Kekewich J. in *In re Thomas*. (1) In the first paragraph of his judgment he says: "I am not prepared to hold that where there is a direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention necessarily gives the tenants for life the enjoyment in specie of the securities retained by the trustees in the exercise of their discretion." The rule is expressed in terms to the same effect in Theobald on Wills, 5th ed. pp. 480, 481; and in the most recent case on the subject, *In re Woods* (2), it is assumed to be the rule. The only point in which *In re Woods* (2) is distinguishable from the present case is that in *In re Woods* (2) the securities were wasting securities. That is the general rule. Is there anything to take this case out of that rule? In my judgment, so far from that, the words of

(1) [1891] 3 Ch. 482, 486. (2) [1904] 2 Ch. 4.

this will are adverse to the contention of the tenant for life. The trustees are to sell and convert the real and personal estate. They may retain any investments subsisting at the testator's death as long as they think proper. The only trusts in favour of beneficiaries are trusts of the "residuary trust funds," which are defined to be the "residuary trust moneys" —that is, the proceeds of conversion—" and the investments for the time being representing the same "—that is, representing the proceeds of conversion. I take that to mean that the tenant for life is entitled to the income of the trust moneys—that is, the proceeds of conversion and the income of the investments made with those moneys. That, of course, includes the income of any authorized investments which are retained (for that is the same as if the trustees had sold them and reinvested the proceeds of sale in the same securities), but does not include the income of securities which do not represent "trust funds" at all, but are items of property which were retained by the trustees only until they could realize them. In order that the tenant for life should not lose income altogether, the Court steps in and says for the proper administration of the estate the value of these investments at the testator's death shall be taken as the value of the proceeds of sale. As these unauthorized securities cannot be kept as part of the estate, the tenant for life gets the income of them as notionally converted at the testator's death. That appears to be the rule laid down with the object of preventing the discretion of the trustees from operating to the prejudice of the tenant for life or the remainderman. It is applied in both ways. That, in my opinion, is the true construction of this will.

Then I am asked, if I cannot find an express gift, to find an implied gift of this income to the tenant for life. That argument also fails. There is no express gift—that is, there is no gift in terms of the income of these unauthorized securities, and I am unable to find an implied gift. But whether I find a gift or not, it is said that the rule to be applied is not the one I have mentioned, but a rule which distinguishes between unauthorized securities which are of a wasting nature and unauthorized securities which are not wasting. Many cases

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have been cited, but in all of them, in one form or another, what was given was the income of the estate, and not, as in the words of this will, the income of the residuary trust funds. It seems that the distinction between those cases and this is that the question in those cases was whether the rule in *Howe* v. *Earl of Dartmouth* (1) ought to be applied. In this case there is an express trust for conversion, and the income of the proceeds is given to the widow. There is certainly one case—*Bulkeley* v. *Stephens* (2)—which has caused me some difficulty. If properly reported, that decision seems to have departed from the principle which I think covers the point. The case is not satisfactorily reported. The will is not set out at length; according to the statement of facts the precise question was not raised; the question was only as to part of the income and for the first year after the testator's death. The case is not mentioned on this point in any of the text-books except in Seton's Judgments and Orders, 6th ed. pp. 1688, 1689, and it is not cited in any of the recent authorities. It was decided before *Brown* v. *Gallatly* (3), but was not referred to in that case. It seems to me, therefore, that I am not bound to treat it as a binding authority, or one which would force me to say that a different principle to that which I have stated is applicable. [His Lordship referred at length to the report in 3 N. R. 105, and proceeded :—]

That decision is not consistent with the result of the other authorities, which is stated in Theobald on Wills, 5th ed. p. 480, and in my view accurately stated. He says : "Where a residue is given upon trust for sale and investment, and the income is then given to a tenant for life, the tenant for life is, in the absence of proper directions, only entitled to such income as the estate would produce when converted and invested in accordance with the directions of the will." And at p. 481 : "Power conferred upon trustees to postpone a sale or to retain securities unconverted will not alter the rights of tenant for life and remainderman." I understand that to correctly represent the law. *Bulkeley* v. *Stephens* (2) does not

(1) (1802) 7 Ves. 137; 6 R. R. 96.
(2) 3 N. R. 105.
(3) L. R. 2 Ch. 751.

appear to be consistent with that statement, and I am not bound by it, for the question I have to determine is one of construction, and I decline to follow it. It is now, I think, settled by the recent case of *In re Woods* (1) that the widow must have interest at the rate of 3 per cent. out of the actual income received in respect of these unauthorized securities, calculated according to their value at the testator's death. The rest of the dividends will have to be invested as capital, and she will have the income of those investments as well as the actual dividends on the preference shares.

Solicitors: *Bompas, Bischoff, Dodgson, Coxe & Bompas; Stibbard, Gibson & Co.*

H. C. R.

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[1900 W. 2789.]

Practice — Mortgagor and Mortgagee — Redemption — Accounts — Proviso for Capitalization of Interest—Mortgagee in Possession—Right to Compound Interest—Sale of part of the Mortgaged Property—Rests.

Under a proviso in a mortgage for the capitalization of interest in arrear for twenty-one days, a mortgagee in possession, through the default of the mortgagor, is not entitled, on the accounts being taken, to charge the mortgagor with compound interest, unless he can prove that after crediting the rents received each half-year the interest was actually in arrear at the times specified in the proviso.

Union Bank of London v. *Ingram*, (1880) 16 Ch. D. 53, *Cockburn* v. *Edwards*, (1881) 18 Ch. D. 449, and *Bright* v. *Campbell*, (1889) 41 Ch. D. 388, discussed and distinguished.

The sale by a mortgagee in possession of part of the mortgaged property does not of itself entitle the mortgagor to an account with a general rest of the rents and profits as well as of the proceeds of sale, as on the date of the receipt thereof.

Thompson v. *Hudson*, (1870) L. R. 10 Eq. 497, explained.

THIS was the further consideration of a mortgagor's action for redemption, in which a summons to vary the master's certificate had been taken out which raised (inter alia) two questions of practice on the taking of the accounts: (1.) whether

(1) [1904] 2 Ch. 4.

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a proviso for the capitalization of interest in arrear applied to the case of a mortgagee in possession, on the ground that the receipt of the rents by the mortgagee, though more than sufficient for the purpose, was not punctual payment by the mortgagor; and (2.) whether a sale by a mortgagee in possession of part of the mortgaged property entitled the mortgagor to an account with a general rest, as well of the proceeds of sale as of the rents, as on the date of such sale.

The proceedings were somewhat complicated by an alleged sale of the whole of the property by the defendant to two of her sons, a dispute as to the rate of interest payable on one of the mortgages under the rules of a building society, and by an alleged denial of the plaintiff's claim as mortgagor to redeem, which was not made out; but the material facts and documents necessary to make the judgment on the above questions intelligible were as follows:—

By a mortgage of October 22, 1887, certain leasehold properties (the subject of this action) were sub-demised by the plaintiff to a building society to secure 1800*l*. This deed, which was an ordinary building society mortgage, contained a covenant for payment of all fines, subscriptions, and other moneys in accordance with the rules of the society, with interest at 5*l*. per cent. free of income tax.

On October 8, 1890, and July 4, 1892, further charges for 120*l*. and 60*l*. respectively were given by the plaintiff to the building society on the security of the properties comprised in the mortgage of October 22, 1887.

By a second mortgage of March 13, 1893, the plaintiff mortgaged the equity of redemption of these properties to the defendant Ann Gill to secure 200*l*. This deed contained a covenant by the mortgagor with the mortgagee for payment of interest at the rate of 6 per cent. per annum, and the following proviso: "Provided also and it is hereby agreed that if and so often as any interest due under the covenant hereinbefore contained or this present provision shall be in arrear for twenty-one days after the day hereby appointed for payment thereof, such interest shall be treated as an accession to the capital moneys hereby secured as on the day on which

the same ought to have been paid, and shall thenceforth bear interest payable at the rate and on the days aforesaid, and this security shall extend to such capitalized interest in all respects."

On May 29, 1894, half a year's interest on this second mortgage being over two months in arrear, the defendant Gill entered into possession of the mortgaged properties. On June 16, 1894, the plaintiff paid and the defendant accepted the interest then due to March 13, 1894, on the second mortgage, but the defendant still continued in possession of the mortgaged properties.

On September 11, 1894, the defendant took a transfer from the building society of the mortgage of October 22, 1887, and the two further charges, the total amount owing on these securities being then 1299*l.* 8*s.* 1*d.* for principal, subscriptions, fines, and interest. This was the amount treated as owing on taking the accounts.

On November 24, 1899, the defendant sold, under the power of sale in the mortgage, a portion of the mortgaged properties for 250*l.*

On September 20, 1900, the present action was commenced, the plaintiff by his writ claiming (inter alia) redemption of the mortgaged properties, with the usual accounts against a mortgagee in possession.

By an order of July 30, 1901, the following accounts were directed: (1.) An account of what was due to the defendant under or by virtue of the said several indentures of mortgage, further charge, and transfer. (2.) An account of sums properly laid out in improvements. (3.) An account of the rents and profits received by the defendant, or which without the wilful default of the defendant might have been received "without prejudice to any question upon further consideration as to rests," with the usual direction that what should appear due under this account should be deducted from what should appear due under accounts 1 and 2. (4.) An inquiry whether any and what parts of the property had been sold; and (5.) An account of the proceeds of any such sale.

The master, by his certificate of July 29, 1904, certified

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(inter alia) that there was due to the defendant from the plaintiff under the second mortgage of March 13, 1893, the sum of 200*l.* for principal, and 158*l.* 13*s.* 1*d.* for compound interest thereon at the rate of 6 per cent. per annum from March 13, 1894, to the date of the certificate; that there was due on first mortgage and further charges 1299*l.* 8*s.* 1*d.* for principal, and 642*l.* 1*s.* for simple interest thereon at 5 per cent. from September 11, 1894, to date of certificate; from these amounts he set off the 250*l.* proceeds of sale thereinafter referred to; he also certified the amount of the rents and profits received by the defendant, and that a part of the property had been sold by the defendant on November 24, 1899, for 250*l.*, and that this sum had been applied by the defendant in reduction of the principal and interest due under the said mortgage securities. The plaintiff took out a summons to vary the master's certificate in the following particulars:—

(1.) "By declaring that, no interest having been due under the mortgages mentioned in the said certificate to the defendant at the date when possession of the mortgaged premises was taken by the defendant, only simple interest at the rate of 6 per cent. per annum is payable upon the mortgage dated March 13, 1893."

(2.) "By directing that a rest be taken on November 24, 1899, upon the sale by the defendant of a portion of the mortgaged premises, and that upon taking such rest the defendant bring into the account all sums received by her in respect of the rents and profits of the said premises up to that date."

(6.) "That the account be directed to be taken with annual rests, upon the ground that the defendant before action brought set up an unfounded claim to the property, and denied the plaintiff's character as mortgagor, and the rents have materially exceeded the expenditure, especially since the plaintiff applied for an account which was refused."

Peterson, for the plaintiff. The master was wrong in allowing compound interest on the second mortgage of March, 1893; in the absence of a special bargain it is never given.

The half-year's interest due in May, 1894, when possession was taken, was tendered and accepted; so that in effect interest was not in arrear in March, 1894, and from that date the rents and profits have been sufficient to pay the interest. The defendant is not entitled to compound interest under the special provisions of the deed unless interest is actually in arrear for twenty-one days, and the onus is on the defendant to shew that this interest was as a fact in arrear before the special provision as to the capitalization of interest can apply. The certificate should, therefore, be varied on this point, and only simple interest on this second mortgage allowed on the accounts.

Having regard to the reservation in the order of July 30, 1901, directing the account of rents and profits to be taken "without prejudice to any question upon further consideration as to rests," this point has been specially left open, and can now be raised. To entitle a mortgagor to an account with rests against a mortgagee in possession special circumstances must be shewn. There are special circumstances in this case; the rents and profits were more than sufficient to cover the interest. That was held sufficient in *Shephard* v. *Elliot* (1) and *Carter* v. *James*. (2) The defendant here denied the plaintiff's right to redeem, and in that case rests may be directed by way of penalty: *Incorporated Society* v. *Richards* (3), *Montgomery* v. *Calland* (4), and *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.* (5) But, assuming that the special circumstances here are not sufficient, then it is clear that, the defendant having sold a portion of the mortgaged property, the plaintiff is entitled to an account with a general rest, as well of the proceeds of sale as of the rents, as at the date of such sale in November, 1899: *Thompson* v. *Hudson*. (6) A mortgagee in possession who sells part of the mortgaged property ought to apply the proceeds first in payment of interest and costs, and should then either pay the balance

(1) (1819) 4 Madd. 254; 20 R. R. 296.
(2) (1881) 29 W. R. 437.
(3) (1841) 1 D. & War. 258; 58 R. R. 266.
(4) (1844) 14 Sim. 79; 65 R. R. 547.
(5) (1879) 4 App. Cas. 391.
(6) L. R. 10 Eq. 497.

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to the mortgagor or apply it in reduction of the principal due: *Thompson* v. *Hudson*. (1) Had this been done, there would have been a great excess of rents over interest. In the present case no interest was in arrear in November, 1899, and the whole of the 250*l.* was available for reduction of principal. The master should, therefore, be directed to take the account with a general rest as on November 24, 1899, as well of the proceeds of sale as of the rents.

Rowden, K.C., and *Austen-Cartmell*, for the defendant. The master was right in allowing compound interest on the second mortgage under the clause for capitalization of interest. Receipt of the rents and profits by a mortgagee in possession is not of itself punctual payment of interest within the meaning of a clause of this kind: *Union Bank of London* v. *Ingram* (2), *Cockburn* v. *Edwards* (3), and *Bright* v. *Campbell*. (4) True, those were cases on a proviso for reduction of interest on punctual payment; but the principle of those decisions is equally applicable here. Receipt of the rents and profits by the mortgagee was not payment of interest by the mortgagor within twenty-one days as provided, and therefore the defendant is clearly entitled to compound interest on this second mortgage.

No case has been made out for taking the accounts with rests, either on the ground that the rents were more than sufficient for payment of the interest, or that any unfounded claim was made to the equity of redemption. As to the contention that a sale of part of the property gives the mortgagor a right to have an account with rests, *Thompson* v. *Hudson* (1) when examined is not an authority for that proposition. The contention of the plaintiff, that whenever there is a sale of part of the mortgaged property by a mortgagee in possession, the mortgagor has a right to an account with a general rest, not only of capital but of rents and profits, as on the date of the sale, is not supported by any of the textbooks.

[Seton on Judgments, 6th ed. vol. iii. p. 1975, Robbins on

(1) L. R. 10 Eq. 497.
(2) 16 Ch. D. 53.
(3) 18 Ch. D. 449.
(4) 41 Ch. D. 388.

Mortgages, vol. ii. pp. 1200, 1207–8, and Fisher on Mortgages, 5th ed. p. 849, § 1794, were referred to at length to shew that there was no such rule as that contended for by the plaintiff.]

Thompson v. *Hudson* (1) was an exceptional case. There is nothing in the circumstances of the present case to make it at all analogous to *Thompson* v. *Hudson*. (1) There is no great or notorious excess of receipts over interest as in that case. As a general rule, annual rests are not directed against a mortgagee in possession, and in the absence of special circumstances, if a mortgagee is not liable to account with annual rests when he enters into possession, he does not become liable until the whole of the mortgage debt has been paid off; *Wilson* v. *Cluer*. (2) A sale of part of the property does not make the mortgagee liable to rests unless there is a large amount of money in hand as in *Thompson* v. *Hudson*. (1) If the granting of rests is done by way of punishment to the mortgagee, the defendant here would, if the plaintiff's contention is right, be punished for selling. The ordinary practice in chambers on taking the accounts against a mortgagee in possession is, unless rests are directed, to take, first, an account of principal and interest, and, second, an account of rents and profits, and if a portion of the property is sold the proceeds of sale are credited to the mortgagor in the first account, but the second account of rents and profits runs on.

[One of the Chancery masters having been sent for and consulted as to the usual practice in chambers in taking accounts of this kind,

WARRINGTON J. said: The very experienced master whom he had just consulted, not the master whose certificate was under discussion, entirely corroborated the defendant's counsel's statement as to the ordinary practice in these cases.]

Peterson, in reply. The practice in ordinary cases is no doubt correctly stated by the defendant's counsel, but this is not an ordinary case. The construction attempted to be put on *Thompson* v. *Hudson* (1) cannot be accepted. That case is an authority for directing a general rest from the date of a sale of the mortgaged property. The mortgagee by exercising

(1) L. R. 10 Eq. 497. (2) (1840) 3 Beav. 136; 52 R. R. 65.

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the power of sale voluntarily does an act by which money comes into his hands, and shews that he has elected to accept part payment of his principal, payment by driblets, and consequently the objection to rests on that ground is removed.

WARRINGTON J., after stating the facts and documents as above, continued:—The first point raised by the summons to vary is whether on the defendant's second mortgage of March 13, 1893, interest ought to be computed as compound or as simple interest. The plaintiff says it ought to be simple interest only, and the defendant says that the master was right in computing it as compound interest. This question depends on the effect to be given in the events which have happened to the proviso for capitalization of interest in this deed of March, 1893, which I have already read. I may say this, that (without stating exactly how the accounts stand, which I am not in a position to do) it appears at first sight, and with sufficient certainty to justify me in assuming this fact for the purposes of this judgment, that the rents received by the defendant were sufficient to make the half-yearly payment of interest, at any rate in some half-years. I think I have sufficient materials before me to enable me to assume that for the purpose of this judgment. In that state of things, what is the rule which I am to apply? In the first place, in this case I am dealing with a provision in a mortgage which imposes a special and peculiar liability upon the mortgagor, and it is for the mortgagee therefore to make out that the event has happened on which that provision takes effect so as to entitle him to the special and peculiar advantage which it gives him. That is the first thing that strikes one in reading the clause. What the mortgagee has to shew affirmatively is that in each half-year, or the particular half-year in which he says he ought to be allowed interest on interest, the interest was in arrear for more than twenty-one days; the onus is on him to shew that affirmatively. This also is to be noticed, that by taking possession the mortgagee himself takes the rents, to which presumably the mortgagor would look as providing the fund out of which he would pay the interest

on the mortgage, and under these circumstances, if I am unfettered by authority, I should come to the conclusion that where, primâ facie at all events, the rents are enough to keep down the interest, in that case the mortgagee has not made out the affirmative case which he has to make out that the interest is in arrear.

How far am I bound by authority? There have been three cases referred to. The first of these is a case of the *Union Bank of London* v. *Ingram*. (1) What the learned judge, Sir George Jessel M.R., was dealing with in that case was a provision contained in the deed for reduction of interest. The provision was this, reading it shortly, that if the mortgagor shall on every April 20 and October 20, so long as the principal sum remains unpaid or within forty days, pay to the mortgagees interest at 5 per cent., then they will accept that interest instead of the higher rate which was secured by the deed. In that case, therefore, unlike the present, it was the mortgagor who had to establish affirmatively that the event had happened which entitled him to the advantage secured to him by that provision, and the event which he had to establish affirmatively as having happened was that he had punctually paid the interest. On that the Master of the Rolls held that, inasmuch as he had paid no interest at all, but the mortgagee had been receiving the rents which when the accounts were taken were applicable not only to interest, but also to principal —that is, were applicable generally to discharge what was due under the mortgage—it could not be said that the mortgagor had paid the interest within the forty days, and accordingly he had not made out his case to be entitled to the privilege given him by the mortgage deed. The second of the three cases was a case of *Bright* v. *Campbell* (2), which was really the same case as the *Union Bank of London* v. *Ingram*. (1) The head-note is: "A proviso in a mortgage for reduction of interest on punctual payment does not apply to the case of the mortgagee taking possession and receiving the rents, whether he does so by arrangement with the mortgagor or otherwise."

In that case Kay J. felt himself bound by the decision to

(1) 16 Ch. D. 53. (2) 41 Ch. D. 388.

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which I have just referred, although he did not like it, and he said he did not like it, and that he was not at all sure he would have decided in the way he did if he had not felt himself bound by the previous decision of the Master of the Rolls.

The third case of *Cockburn* v. *Edwards* (1) is one that gives me rather more trouble. That case was shortly as follows: There was a mortgage taken by a solicitor from his own client in which he had inserted a power of sale which did not contain the usual restrictions on the exercise of the power that it shall not be exercised unless the interest is in arrear. The mortgagee had taken possession and had been receiving the rents, and a question arose whether, assuming that the mortgagee had inserted a power of sale with a proper restriction, as the Court held he ought to have done, whether even on that assumption the power of sale had arisen, and accordingly, to put it in another way, the question arose, Was the interest in arrear? It was not necessary to decide it, but the Master of the Rolls did in his judgment hold that the interest was in arrear, because if the clause had contained that provision the interest must be treated as in arrear, inasmuch as the receipt of the rents was not sufficient to discharge the interest. What he says is this, after referring to the omission of the clause and saying it ought to have been inserted (2): "The sale then was improper unless there was interest three months in arrear, and I think that there is great weight in the argument for the respondent, that it was improper whether there was interest in arrear or not, for that the client had a right to be informed what the terms were upon which the estate could be sold, and that the absence of such information made the sale improper. I am disposed to think that this argument ought to prevail. But was there any interest in arrear? It has been argued that a mortgagee in possession, if he receives rents to an amount more than sufficient to pay the interest, must be taken to have been paid his interest. I cannot accede to that argument. A mortgagee in possession first deducts expenses, and then what remains goes against principal and interest; but till an account is taken there is no set-off, there

(1) 18 Ch. D. 449. (2) 18 Ch. D. 456.

is no appropriation of the rents." Then he goes into and discusses some of the authorities, which I need not go through. Then he says this (1): "But the receipt of rents by the mortgagee is not a payment by the mortgagor, or by any one on his behalf. The mortgagee receives rents which are his own, subject, of course, to the right of redemption; he is not receiving interest or principal, but receiving the rents of property which belongs to him subject to the right of the mortgagor to redeem it." The result was that he treated the interest as in arrear notwithstanding the receipt of rents. The other two learned judges deal with the point in a different way. Brett L.J. says this (2): "It has been urged that there is no damage because interest was in arrear for three months, so that if the power had been in the ordinary form the property might have been sold. But was there any interest in arrear? The argument on behalf of the mortgagee went so far as this, that when a mortgagee is in possession there must be interest in arrear, unless an actual appropriation of the rents to payment of interest has been made. It is not necessary to decide that point, for we have here accounts which shew actual appropriation. The last account rendered shews that in the view of the mortgagee interest had been paid up to March 25, 1877, and that the whole principal remained due. This shews that the rents must have gone in payment of interest, and if the interest was paid up to March 25, 1877, there cannot have been any interest in arrear for three months when that sale took place. If, therefore, the power of sale had been in the proper form, the defendant would not have been entitled to sell under it." Brett L.J. holds, therefore, that the interest was not in arrear, that the rents had been appropriated to the interest, and that it had been paid. Cotton L.J., after stating his conclusion on the first part of the case as to the improper omission of the restriction which I have alluded to, says this (3): "This being so, we must come to the conclusion that the sale was improper unless six months' notice was given or interest was three months in arrear. It is clear that notice was not

(1) 18 Ch. D. 457. (2) 18 Ch. D. 461.
(3) 18 Ch. D. 463.

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given, but interest was in arrear unless the rent received by the defendant can be treated as applied in payment of interest. Now, receipt of rents by a mortgagee is not, as a general rule, equivalent to a payment by the mortgagor. If a mortgagee enters into possession, his receipt of rents is not payment of interest by the mortgagor so as to entitle the latter to the benefit of a proviso for reduction of interest on punctual payment; and I quite agree with the remarks of the Master of the Rolls as to the dictum in *Brocklehurst* v. *Jessop*. (1) If, however, a mortgagee receives rents which are all along more than sufficient for payment of interest and expenses, so that his account, if he were to render one, would shew that there was in his hands at every time a balance applicable to reduction of the principal, I am not prepared to decide that he can merely, because there has been no actual appropriation of the rents to payment of interest, say that there is interest in arrear within the meaning of the proviso in the power of sale. It is not, however, necessary to determine that question in the present case, for the accounts rendered by the mortgagee treat the rents as applied in payment of interest, and, that having gone on for several years, I think it must be taken as established that there was an arrangement that the rents should be so applied; and, this being so, the accounts shew that there was not any interest in arrear for three months when the sale was effected."

I have read those two judgments because it is quite clear on Cotton L.J.'s judgment that he did not accept the dictum of the Master of the Rolls in his judgment, but on the contrary said he was not prepared to decide that that was the law, and Brett L.J., though not so emphatic as Cotton L.J., was obviously not prepared at the moment to follow what the Master of the Rolls had said. The result is, I think, that in dealing, as I have to deal here, with a provision like the present, a provision in which it is for the mortgagee to shew that an event has happened which entitles him to this special peculiar privilege of compound interest, I am entitled to say that I am not fettered by authority, and am entitled to give effect to my

(1) (1835) 7 Sim. 438, 442; 40 R. R. 172.

own opinion, which is, that in a case like the present the mortgagee has not shewn that the interest is in arrear so as to entitle him to claim compound interest on this security. The result is that, in reference to that second mortgage of March 13, 1893, I think the interest ought to have been computed as simple interest at 6 per cent., and not as compound interest, and to this extent the certificate must be varied.

The second objection taken to this certificate raises a very important point of practice. It is this: A mortgagee in possession sells a part of the mortgage property. The judgment directs the ordinary account, an account of the money due on the security, an inquiry as to the proceeds of sale, and an account of the rents and profits, with the usual direction to set off against what shall be found due on the first account the amount found due on the rents and profits account. Now I have ascertained from a very experienced master, and I think it is substantially admitted, that under a judgment in this form the ordinary course of practice in chambers is this. The first account is treated as separate from the account of rents and profits. If money is received from an exercise of the power of sale, that money is credited to the mortgagor under the first account at the date at which it is received, but unless rests have been directed in the judgment the account of rents and profits, following the usual rule, goes on without rests. That is ordinarily the common practice in chambers under the usual mortgagee's account; but the argument before me here really is that, having regard to the reservation in the judgment of July 30, 1901, in the terms which I have already read, namely, that the direction to set off what is found due on the account of rents and profits is to be "without prejudice to any question upon further consideration as to rests," I am now to deal with this case as if I had at the hearing to determine whether rests ought to be ordered or not. The ordinary rule is admitted that in the absence of special circumstances the account against a mortgagee in possession is not directed with rests—that is to say, the account of the rents and profits runs on from beginning to end without reference to the question whether he has at any particular time had in his hands more than sufficient to pay

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the interest or not, the reason being that a mortgagee is not bound to accept payment by driblets, but is entitled to have the account taken as a whole, and not to be treated as repaid until that account has been so taken. It is said there are certain exceptions. One of those is where the mortgagee has himself claimed the property—that is to say, has insisted that the mortgagor is not entitled to redeem. So far as I can make out, the only principle upon which an exception is made in that case is that it is by way of punishment to the mortgagee; there can be nothing else, because his receipts have been the same whether he has been insisting upon his title to the property or not. I think it is merely a means whereby the Court has penalised the mortgagee in order to shew dissatisfaction with the case he has set up. That is one exception, and it is sought to bring the present case within that.

Now it is quite true that the defendant, the mortgagee, did originally say that the property had been sold; but when the case came on for trial, in fact when the defence was put in, that part of the case was abandoned, and, in my judgment, where that is so, I am not in a position to say that I am bound to impose that penalty upon the mortgagee which has in some cases been imposed where he has insisted on his ownership of the property. I think in all those cases he has insisted on that till the trial, and then the Court has imposed that penalty upon him. It was suggested that there is another exception—I think I am using Mr. Peterson's own words—where the excess of the rents and profits over the interest is great and notorious. The only case which supports that contention is the case which we have discussed so much to-day of *Thompson* v. *Hudson*. (1) In reality that was not a case of rests at all. What happened in that case was that it appeared when the accounts came to be taken that at a certain date in June, 1861, the mortgagees, having exercised the power of sale, were found to have in their hands a sum of 20,673*l*. or thereabouts more than what was due to them for interest and costs. Sir John Romilly M.R. having analyzed the accounts at that date, and finding as a fact that there was that large excess at that

(1) L. R. 10 Eq. 497.

moment of receipts over expenditure, took what I think I am bound to say was an exceptional course—and there I am only speaking on the authority of *Nelson* v. *Booth* (1)—of drawing a line at that date on seeing that there was a sum of 20,673*l.* in the hands of the mortgagees which they ought either to have applied in discharge of the principal, or have paid over to the mortgagor.

Now, am I at liberty in this case to take that view? I have looked at the accounts to form an opinion, so far as it is possible to do so, and I cannot find on an inspection of the accounts that on November 24, 1899, the receipt of rents, having regard to the money expended for repairs, had more than discharged the interest due under the mortgage; on the contrary, as far as I can see, again only from such inspection as I am able to make here in Court, they were not quite sufficient for that purpose at that time—at all events, there is no excess so great and so notorious that if the matter were now before me on motion for judgment or notice of trial I should, in my opinion, have been justified by the authorities on this point in regarding the case as so exceptional as to direct rests, and without directing rests I do not see how I could do what the plaintiff now asks me to do with regard to this 250*l.* On the accounts as they have been taken the 250*l.* has been dealt with in the ordinary way—that is to say, it has been brought in on the first account, the account of what is due on the mortgage as at the date of its receipt, the account of rents and profits running on without interruption. In my opinion that is right, and in that respect the master's certificate cannot be varied.

Solicitors: *Scott, Spalding & Bell, for William Lees, Oldham; Bower, Cotton & Bower, for Longbotham & Sons, Halifax.*

(1) (1858) 3 De G. & J. 119.

W. C. D.

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Dec. 1, 3.

In re BEALES' SETTLEMENT. BARRETT *v.* BEALES.

[1904 B. 4454.]

Settlement—Power—Appointment—Perpetuity—Election.

When a testamentary appointment fails for infringing the rule against perpetuities, persons taking in default of appointment are not bound to elect between their interests in the settled fund and interests in the appointor's own property given to them by the will.

In re Bradshaw, [1902] 1 Ch. 436, not followed.

ADJOURNED SUMMONS.

This was an application by the present trustees of a settlement of 1833, for the opinion of the Court, which raised a question of election in consequence of a testamentary appointment being void as transgressing the rule against perpetuity. A report is only necessary in consequence of the recent conflict of judicial opinion in *In re Bradshaw* (1) and *In re Oliver's Settlement.* (2) The material facts were briefly as follows:—

By a settlement of September, 1833, made on the marriage of John Beales and Frances Day, afterwards his wife, personal property was settled upon trust to pay the income thereof to the husband and wife for life, and after the death of the survivor upon trust for the issue of the marriage born in the lifetime of John Beales and Frances his wife, as they should jointly or as the survivor should by deed or will appoint, and in default of appointment for the children of the marriage in equal shares at twenty-one as to sons, and at twenty-one or marriage as to daughters. There was no hotchpot clause.

There were three children of this marriage, who all attained twenty-one—John Day Beales, Frances Elizabeth Youngs, and Gertrude Lloyd Cumming.

Frances Beales, who was the survivor, by her will of May 8, 1869, in exercise of the said power given her by the said settlement and of a power given her by the will of her late father, appointed and bequeathed all the funds therein respectively

(1) [1902] 1 Ch. 436. (2) Ante, p. 191.

comprised and all other her personal estate to her trustees therein named upon trust for conversion, and directed her trustees to hold the net proceeds after payment of her debts, funeral and testamentary expenses, as to one-third for her son John Day Beales absolutely, as to one other third upon trust to invest the same and pay the income thereof to her daughter Mrs. Frances Elizabeth Youngs for her life, without power of anticipation, and after her death to stand possessed of the securities representing the said third share in trust for her children at twenty-one. And as to the remaining third upon similar trusts for her other daughter Mrs. Gertrude Lloyd Cumming for her life, and after her death for her children. Frances Beales died in April, 1880. Frances Elizabeth Youngs had eight children, who lived to attain twenty-one, and were all born in the lifetime of Frances Beales.

Frances Elizabeth Youngs died in August, 1904, and on her death the legal personal representative of John Day Beales (who died in June, 1896) claimed to be entitled to one equal third of the share of the settlement funds of which Frances Elizabeth Youngs enjoyed the income during her life without making any compensation to her children out of the share of the said John Day Beales in the residuary personal estate of Frances Beales.

The trustees of the settlement thereupon took out the present summons for the direction of the Court.

Rolt, for the trustees.

Colquhoun Dill, for the legal personal representative of John Day Beales. The trust for the children of Mrs. Youngs is too remote, and the fund on her death goes as in default of appointment. No question of election arises in this case, because the appointment is bad as infringing the rule against perpetuities. The case is covered by authority, *In re Handcock's Trusts* (1) being a recent one directly in point. The only authority that is against this contention is *In re Bradshaw* (2), and that was criticized and not followed in *In re Oliver's Settlement*. (3)

[He was stopped.]

(1) (1889) 23 L. R. Ir. 34. (2) [1902] 1 Ch. 436. (3) Ante, p. 191.

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Blakesley, for grandchildren. The representative of J. Day Beales is bound to elect between his interest in default of appointment and his interest in Frances Beales' own property; and he must make compensation to the grandchildren. The case is exactly covered by *In re Bradshaw* (1), on which I rely. *Wollaston* v. *King* (2), which is the foundation of most of the subsequent decisions, is after all only a dictum on this particular question. The decisions in *In re Warren's Trusts* (3) has also been criticized in *In re Wheatley* (4) and *In re Brooksbank*. (5) *In re Handcock's Trusts* (6) is an Irish case which is not binding on these Courts.

Cur. adv. vult.

Dec. 3. WARRINGTON J. The question I have to determine is whether, when a testamentary appointment fails for infringing the rules against perpetuities, persons taking in default of appointment are put to their election between their interests in the settled fund and interests in the appointor's own property. The facts are as follows: [Having shortly stated the facts, his Lordship continued:—]

It is admitted that the trust for Mrs. Youngs' children is too remote, and that her share goes, in default of appointment, in thirds between the legal personal representative of John Day Beales (who is dead) and Mrs. Youngs, and the defendant Mrs. Cumming; but it is said that the legal personal representative of John Day Beales is put to election between his interests in default of appointment and his share in the testatrix's own estate. The case is covered by authority, but unfortunately the authorities are conflicting. In favour of the proposition that in a case where an appointment fails for remoteness, as distinguished from one in which it fails as being in favour of persons not objects of the power, a case of election is not raised, are the following authorities: *Wollaston* v. *King* (2), *In re Warren's Trusts* (3), *In re Handcock's Trusts* (6), and

(1) [1902] 1 Ch. 436.
(2) (1869) L. R. 8 Eq. 165.
(3) (1884) 26 Ch. D. 208.
(4) (1884) 27 Ch. D. 606.
(5) (1886) 34 Ch. D. 160.
(6) 23 L. R. Ir. 34.

In re Oliver's Settlement. (1) In *Wollaston* v. *King* (2) it is said the passage relied upon is a mere dictum; it is, however, contained in a considered judgment, and may be taken to express the deliberate opinion of the very learned judge, James V.-C. *In re Warren's Trusts* (3) was a decision of Pearson J., and *In re Handcock's Trusts* (4) was a decision of the Irish Court of Appeal. Finally, in *In re Oliver's Settlement* (1) Farwell J. reviewed all those authorities and some earlier ones, and came to the conclusion that they should be followed rather than the decision of Kekewich J. in *In re Bradshaw.* (5) This is the only authority on the other side, and it is undoubtedly a deliberate decision of that learned judge after consideration of the several authorities other than *In re Oliver's Settlement.* (1) In this state of things, all I can do is to say that in my view the balance of authority is against raising a case of election, and I so hold accordingly. An attempt was made to distinguish this case on the ground that the appointment fails as extending to persons not objects of the power. But to ascertain whether an appointment fails on this ground the Court looks at the actual facts, and not, as in the case of the rule against perpetuities, to possible facts: *Harvey* v. *Stracey.* (6) In the present case, on the actual facts, no person not an object is included. Therefore, the distinction does not exist.

[His Lordship accordingly made a declaration that the share of Mrs. Youngs in the funds comprised in the settlement ought to be treated as unappointed, and that the three children could claim such share without making compensation out of their interests under the will.]

Solicitors: *White, Borrett & Co.*

(1) Ante, p. 191.
(2) L. R. 8 Eq. 165, 175.
(3) 26 Ch. D. 208.
(4) 23 L. R. Ir. 34.
(5) [1902] 1 Ch. 436.
(6) (1852) 1 Drew. 73, 117.

W. C. D.

Referred to. NADARAJAN CHETTIAR *v.* MAHATMEE
[1950] A. C. 481

C. A.
1904
Nov. 15, 17, 18, 19, 21, 22; Dec. 5.

SAUNDERS *v.* NEWBOLD.

[1904 S. 498.]

Money-lender—Borrower—Loan Transaction—Absence of Risk—Exorbitant Interest—"Harsh and unconscionable"—Reopening closed and present Transactions—Jurisdiction—Account—Form of Order—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.

In 1903 S., a money-lender, advanced 2000*l.* to A., the managing director of a brewery company, on a promissory note for 3300*l.* repayable by monthly instalments, but the whole sum to be immediately payable on default in payment of any instalment. S. was aware that A. was a man of means and that the advance would be without risk. At the time of the advance A.'s business capacity had become somewhat impaired through habits of intemperance, though this was not noticeable by an ordinary observer, and in fact S. believed he was dealing with a competent person.

A. duly paid the first instalment under the note, but before the next fell due he died from the effects of intemperance. His executor refused to make any further payment on the ground that the loan transaction was "harsh and unconscionable" within the Money-lenders Act, 1900.

In an action by S. against the executor to recover the balance of the note:—

Held, by Kekewich J., that in the circumstances, and especially having regard to the absence of risk, the transaction was "harsh and unconscionable" within s. 1 of the Act, and must be reopened:

Held, further, by Kekewich J., that under the same section a previous 1000*l.* loan transaction between S. and A. in which an excessive rate of interest had been charged, but which had been closed by payment, must also be reopened, although no case as to its having been "harsh and unconscionable" had been raised in the action by the defendant either by counter-claim or otherwise or at the trial.

Judgment was accordingly given entitling S. to repayment only of the sums actually advanced by him to A. under both loans, together with interest at 10 per cent. per annum only. On appeal:—

The Court of Appeal affirmed the judgment of Kekewich J. so far as regarded the subsisting 2000*l.* transaction, but struck out so much of it as related to the closed 1000*l.* transaction as to which no case had been properly raised by the defendant, though without prejudice to his right to bring an action to reopen that transaction if so advised.

Under s. 1 of the Money-lenders Act, 1900, the Court has power, when reopening an existing money-lending transaction, to reopen also one that

is past and closed, provided it is relevant to or in some way connected with the existing transactions.

Form of judgment under the Act reopening a loan transaction and directing an account (post, p. 263).

THIS was an action brought by a firm of money-lenders trading as "P. Saunders," at 11, Savile Row, London, and registered under the Money-lenders Act, 1900, against James William Newbold, the executor of Hepworth Tropolet Alton, deceased, for 3025*l.*, being the balance remaining due on a promissory note for 3300*l.*, dated October 3, 1903, made by Alton in favour of the plaintiffs or order. The note provided that the money was to be paid by twelve consecutive monthly payments of 275*l.* each, the first to be paid on November 3, 1903, and "that in the event of default in any one payment or part thereof the whole amount remaining unpaid shall become immediately due and payable."

Alton, who died on November 18, was, until shortly before his death, the managing director of Alton & Co., Limited, brewers, of Wardwick Brewery, Derby.

This action was commenced in the King's Bench Division by summons under Order XIV., and by a consent order made on the summons the action was directed to be set down for trial without pleadings, the defendant to be entitled to raise any defence at the trial. In the meantime an action had been commenced and an order made in the Chancery Division for the administration of Alton's estate; accordingly by an order made in the Chancery action the King's Bench action was transferred to the Chancery Division.

The circumstances which gave rise to the signing of the promissory note were as follows: Philip Samuel, a member of the plaintiff firm, which consisted of himself and another, Braham Samuel, was introduced to Alton by Henry Sagar, another West End money-lender, with whom Alton had had some previous transactions. In September, 1903, Alton applied to Sagar for a loan of 2000*l.* Sagar thereupon communicated with the plaintiffs, and eventually it was arranged that the plaintiffs should advance the 2000*l.* upon the terms of Alton giving a promissory note for 3300*l.*, repayable in the manner

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above stated. The transaction was carried through at Sagar's office on October 3, 1903, when the note was signed by Alton and he received from Philip Samuel a cheque for 2000*l.*, which, however, he did not present for payment until a week afterwards. The first instalment of 275*l.* was paid by Alton on November 3, but he died before the next instalment became due, and his executor refused to pay, whereupon the plaintiffs brought this action. The plaintiffs, before advancing the money, had caused inquiries to be made as to Alton's financial position, and had ascertained that he was a man of substance but rather slow in his payments. The net value of Alton's estate was sworn at over 44,000*l.* The defendant offered to pay in full discharge of the note the amount of the loan and interest thereon at 10 per cent., after deducting the instalment already paid by the deceased, but the plaintiffs refused to accept that offer. The defendant's case was that the deceased, at the date when the promissory note was signed, was not in a fit condition to transact business owing to long-standing habits of intemperance, and that his condition must have been apparent to the plaintiffs; and it was also contended that the excessive rate of interest charged rendered the transaction "harsh and unconscionable" within the Money-lenders Act, 1900 (63 & 64 Vict. c. 51). Alton had had a previous money-lending transaction with the plaintiffs, they having on July 6, 1903, lent him a sum of 1000*l.*, charging him 400*l.* interest, the whole 1400*l.* being repayable by five monthly instalments of 250*l.* each and a final instalment of 150*l.*, with a default clause; but the whole was repaid in September, 1903, that transaction being thus entirely closed. No question was raised by the defendant in the action as to the validity of that transaction, either by counter-claim or otherwise, or at the trial.

The action was tried before Kekewich J. in June, 1904, upon oral evidence. In delivering judgment his Lordship, dealing alone with the 2000*l.* loan, the subject-matter of the action, said that, in his opinion, the business incapacity of Alton was not such as to be noticeable by an ordinary observer, and that he could not attribute to the plaintiffs any knowledge of it.

He thought the plaintiffs were justified in treating Alton as a man of ordinary capacity who was quite competent to deal with a money-lender in a fair matter of business. But his Lordship thought that the high rate of interest charged was "harsh and unconscionable" within the Money-lenders Act, 1900, because the plaintiffs had made inquiries and had ascertained for themselves that the borrower was a man of means, in good credit, and well able to repay the loan. In those circumstances it was impossible to hold that the plaintiffs had dealt reasonably with the borrower. The defendant was, therefore, entitled to judgment with costs, and an account must be taken on the footing of his being liable for the 2000*l.*, with interest thereon at 10 per cent.

After the delivery of the judgment there was a discussion as to the proper form of the judgment, in the course of which the defendant's counsel asked that the 1000*l.* transaction (which had been disclosed by the evidence at the trial) should be included in the judgment. Ultimately, his Lordship expressed his opinion that under the Act the Court was bound to direct an account of all transactions between the money-lender and the borrower, and accordingly held that the loan transaction of the 1000*l.* must be reopened as well as that of the 2000*l.*

Eventually the judgment was drawn up in the following form:—

"This Court doth declare that all the transactions and accounts whatsoever between the plaintiffs Braham Samuel and Philip Samuel (carrying on business as money-lenders and suing herein under the registered name of 'P. Saunders') and Hepworth Tropolet Alton deceased ought to be reopened and set aside, and that the defendant, as executor of the will of the said H. T. Alton deceased, ought to be relieved from payment of any sum in excess of the sums actually advanced by the plaintiffs to the said H. T. Alton deceased and interest thereon at the rate of 10*l.* per cent. per annum; and that if any such excess has been paid by the said H. T. Alton deceased, or by the said defendant as the executor of his will, the plaintiffs ought to repay the same to the said defendant: And this Court doth order and adjudge the same accordingly. And it is ordered that the following account be taken, that is to say, an account of all sums actually advanced by the plaintiffs B. Samuel and P. Samuel, or either of them, or any one on their behalf, to or for the use of the said H. T. Alton deceased, and of all sums received by the plaintiffs or either of them, or any one on their behalf, from the said H. T. Alton, or from

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the defendant as his executor, in respect of any such advance; and that in taking such account the defendant be charged with interest at the rate of 10*l.* per cent. per annum on the sums from time to time owing to the plaintiffs, and that the balance due from either of the parties to the other be certified. And it is ordered that the plaintiffs do pay to the defendant his costs of this action up to and including this judgment in any event. And this Court doth specially reserve the question by whom the costs of the said account are to be borne. And it is ordered that the further consideration of this action be adjourned."

From that judgment the plaintiffs appealed upon certain grounds stated in the notice of appeal, and which were to the following effect: (1.) That upon the facts of this case as found by the learned judge the defendant was not entitled to relief; (2.) that upon the facts of this case as found by the learned judge he was wrong in holding that the transaction in question in this action was harsh or unconscionable, or otherwise such that a Court of Equity would give relief; (3.) that the learned judge was wrong in reopening the closed transaction of July 6, 1903; (4.) that the account ordered was wrong in form, and the interest allowed thereon to the appellants was unreasonably low; and (5.) that the Money-lenders Act had no application to the transaction of July 6, 1903.

The appeal was heard on November 15, 17, 18, 19, 21, and 22, 1904.

From the evidence taken at the trial it appeared that Alton's transactions with money-lenders commenced in October, 1902, and continued the following year, several money-lenders, of whom Sagar was one, from time to time negotiating loans with him; that all these money-lenders were aware that Alton was a man of means and that advances might be made to him without risk, so that they persistently urged him into loan transactions; that for the purpose of effecting the 2000*l.* loan in October, 1903, Sagar introduced the plaintiffs to Alton, Sagar receiving from the plaintiffs a commission of 57*l.* 10*s.* for so doing; and that although the loan was made to Alton ostensibly by the plaintiffs, there were no less than five or six money-lenders, including Sagar, who contributed to it under an arrangement that they, the contributors, should share in a profit or bonus on the transaction in proportion to the amounts of their several contributions. The general effect of the rest

of the evidence sufficiently appears from the facts of the case as above stated, and also from the considered judgment of the Court of Appeal.

Lawson Walton, *K.C.*, and *G. Hohler*, for the plaintiffs. The transaction relating to the 1000*l.* loan was entirely closed when that sum was repaid in September, 1903. It is submitted that s. 1 (1) of the Money-lenders Act, 1900, does not apply to a

(1) By s. 1, "(1.) Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued.

"(2.) Any Court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the Court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived.

"(3.) On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the Court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

"(4.) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money-lending by a money-lender.

"(5.) Nothing in the foregoing

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transaction which has been closed, and that such a transaction cannot be reopened. That section, it is contended, applies only to an existing liability—to that transaction in respect of which the action is brought—to a case in which the relation of borrower and lender is still subsisting. When borrowed money has been repaid there is no longer a "borrower." If part of an old debt remains unpaid and then a fresh loan is made to the borrower, and the two transactions are mixed up, then s. 1 may apply to both. But it is contended that it does not apply to an entirely closed transaction such as we have here.

[ROMER L.J. Before the Act a borrower could, in a proper case, obtain relief after repayment of the loan. Was the Act intended to cut down the remedy? Of course, though the Court may have jurisdiction, it may not always think fit to exercise it.]

If a money-lender brings an action against a borrower in respect of a particular transaction, the Act gives the Court power to reopen that transaction in favour of the borrower. But the power is to reopen that same transaction, not another. In the present case the defendant made no counter-claim. The claim to have the first transaction reopened was not made until the case was actually before Kekewich J., and was really not discussed or dealt with until after his Lordship had delivered judgment. That claim is, therefore, made too late.

To enable the Court to give relief to the borrower, sub-s. 2 of s. 1 shews that he must be a person "liable"—that is, liable in fact; here all liability for the 1000*l.* is passed and gone. The language of s. 1 throughout imports a present liability.

Then, with regard to the 2000*l.* loan, the real subject of the action, the evidence does not shew that Alton was not a free agent, or otherwise than a competent man of business. It may appear singular that a man of substantial means, such as he was, should have had recourse to a money-lender; but if a man in that position chooses to borrow for reasons he does

provisions of this section shall affect the rights of any bonâ fide assignee or holder for value without notice.

"(6.) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court."

not care to explain, there is no power in the Court to go behind the transaction and open it up. The Act is not intended to help those who are able to stand alone. All the cases in which the Court has granted relief are where advantage has been taken of the necessities of the borrower—where he has been enmeshed, or did not understand the transaction, or was not a free agent, or not a competent man of business. There is no evidence here that the transaction was harsh or unconscionable, and the Act was not intended to create a new class of unconscientious acts on the part of a money-lender.

In *Nevill* v. *Snelling* (1), it was held that "the principle on which a Court of Equity has granted relief from an unconscionable bargain entered into with an expectant heir or reversioner for the loan of money, applies also to the case of money being lent on unconscionable terms (not fully understood by the borrower, and known not to be fully understood by him by the lender), to a young man, being a minor at the time of the first transaction," who had no property of his own and no expectation, except general expectations founded on his father's position in life, the money being lent without any thought of repayment by the borrower, but on the credit of those general expectations, and in the hope of extorting payment from the father to avoid the exposure attendant on the son's being made a bankrupt. That does not apply to the present case, the facts of which are totally different.

[VAUGHAN WILLIAMS L.J. I doubt myself whether Kekewich J. was right in upsetting the first transaction.

ROMER L.J. If you have two money-lending transactions, and the first happens to be closed, however harsh and unconscionable it may have been, I very much question whether you can upset the first unless it is in some way connected with the second which can be upset.]

Sub-s. 2 of s. 1 does not say that a person who may have had a transaction with a money-lender several years ago can bring an action to have it reopened. He cannot apply for relief under the Act when he has ceased to be a borrower and is under no liability, for the sub-section refers in terms to a

(1) (1880) 15 Ch. D. 679.

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pending liability. Both sub-s. 1 and sub-s. 2 contemplate a present liability, not a closed transaction. The object of the Act is to give relief to a person who is actually in the meshes of a money-lender. *Nevill* v. *Snelling* (1) shews the limitations to the right to relief. The Act was not intended to put money-lenders into a separate class, but merely to give facilities for reopening money-lending transactions. As the case last cited shews, the borrower must prove that the transaction was unconscionable, that he was entrapped, that he was not a free agent; and the evidence does not go that length in the present case. There is nothing morally wrong in trying to get as much interest for your money as you can. If a man with his eyes open chooses to enter into a loan transaction, he cannot avail himself of the Act. *Bennett* v. *Bennett* (2) shews how the Court should regard transactions of this kind.

[COZENS-HARDY L.J. Has not the Act put money-lenders in a position different from that in which they were before?]

If they have been guilty of a moral offence, yes; but not otherwise. The Act assumes that the business is a useful one, and seeks to regulate it. Conducting his business properly involves no moral enormity on the part of the money-lender. In order to exercise the powers given by the Act the Court must find something more than charging a high rate of interest, for in a fair bargain the borrower may agree to pay that rate: it must find that there has been some moral wrong. The real question is whether the one party to the transaction has taken an unfair advantage of the other: *Middleton* v. *Brown* (3), where Sir G. Jessel M.R. defines what is an unconscientious bargain against which equity will relieve. *In re a Debtor* (4), which was relied on by the defendant in the Court below, came as a surprise to the profession, for it was there held by the Court of Appeal that excessive interest alone was sufficient to justify the Court in setting aside a loan transaction as "harsh and unconscionable" within the Act. It is submitted that that decision is not sound, and that the more correct view has been taken by the Court of Appeal in a later

(1) 15 Ch. D. 679.
(2) (1876) 43 L. T. 246, n.
(3) (1878) 47 L. J. (Ch.) 411.
(4) [1903] 1 K. B. 705.

case (unreported) of *Samuels* v. *Burton* (Court of Appeal, Stirling and Mathew L.JJ., May 4, 1903), where it was held that a loan transaction could not be reopened merely because the rate of interest might have been excessive; that it was necessary to shew besides that the borrower was incompetent or was misled. In that case the Court pointed out that the borrower understood the transaction, was of adult age, and no pressure was exerted upon him, and that as he had chosen to borrow at a high rate of interest with his eyes open the Court could not go behind the transaction. That exactly applies here. In *In re a Debtor* (1) the borrower was in needy circumstances; the case has no application to such a case as this, in which the borrower had ample means. Why should not a man of independent means and under no pressure, using his reason, say, "I prefer going to a money-lender instead of to my banker for a temporary loan, as I can get the money more easily and with less embarrassment to myself"?

[ROMER L.J. A lender asking for and receiving an enormous rate of interest must know that the borrower is not in a competent condition.]

The standard of what is unconscionable in money-lending transactions is really fixed by such cases as *Wallingford* v. *Mutual Society* (2) and *Levene* v. *Greenwood*. (3) The recent case of *Poncione* v. *Higgins* (4) shews that the mere fact of charging a high rate of interest is not sufficient to make the transaction "harsh and unconscionable."

P. O. Lawrence, K.C., and the *Hon. M. Macnaghten*, for the defendant. In *Poncione* v. *Higgins* (4) two separate transactions were impeached, and upon the particular facts the Court relieved against the one but not against the other. The unreported case of *Samuels* v. *Burton* was also decided upon the particular facts and is no guide here. In the present case the evidence, we submit, proves distinctly that Alton was undermined in mind and intellect, that he had got into the hands of a set of money-lenders of whom Sagar was the prime mover, and that advantage was taken of his condition.

(1) [1903] 1 K. B. 705.
(2) (1880) 5 App. Cas. 685.
(3) (1904) 20 Times L. R. 389.
(4) (1904) 21 Times L. R. 11.

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When a money-lender bargains with a borrower upon terms to which it is clear that no man in his senses would have assented, the presumption is that a fraud has been practised by the money-lender. It is a fraud of the kind which falls under the second head of fraud mentioned by Lord Hardwicke L.C. in *Earl of Chesterfield* v. *Janssen*. (1) If the borrower wants the money and cannot lay his hand upon it, he may be willing to pay highly for the accommodation. But in the present case Alton could have got the money by drawing a cheque on his bankers. It cannot be supposed that he really intended to make a present to the money-lender. And the evidence shews that after he had got the plaintiffs' cheque for 2000*l*. he did not present it for payment for a week. It is contended that the fair inference is that the plaintiffs knew Alton to be a man who was liable to be induced by money-lenders to borrow money when he did not really want it.

It is said on behalf of the plaintiffs that a transaction which has been completed by repayment cannot under the Act be afterwards reopened—that under sub-s. 1 of s. 1 the Court can only reopen "the transaction" which the lender is seeking to enforce, and that the Court has no power under sub-s. 1 to reopen any completed transaction. But sub-s. 1 says that the Court "may reopen the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, *reopen any account already taken between them*." It is submitted that the words in italics are not limited to an account relating to that transaction in respect of which the money-lender is suing, but apply to any prior transaction between him and the borrower, even if it has been completed by payment. In *Poncione* v. *Higgins* (2) one of the transactions which the Court set aside had been closed, but it is true that this objection was not taken or dealt with by the Court. It is contended that under sub-s. 2 the Court has jurisdiction to reopen a closed transaction. The word

(1) (1750) 2 Ves. Sen. 125, 155; 1 W. & T. (7th ed.) 289, 301.
(2) 21 Times L. R. 11.

"borrower" in that sub-section does not necessarily imply that there is still an existing loan. It is sufficient that there has been the relation of lender and borrower. The Court may not always think it right to exercise this jurisdiction, and perhaps it would require to be satisfied that the closed transaction was "harsh and unconscionable." Sub-s. 6 preserves the old jurisdiction of Courts of Equity, and those Courts were in the habit of relieving borrowers after payment.

[ROMER L.J. Though the old jurisdiction of Courts of Equity is preserved, it may be that the special remedy conferred by the Act is given only in the case of a still existing liability.]

The defendant might have delivered a counter-claim in respect of the first transaction, but the parties consented to an order that the action should be tried without pleadings. When, however, that order was made the judge said that the defendant would not be prejudiced by the absence of pleadings. The evidence in effect shews that the plaintiffs and those who acted with them had determined when the first transaction was closed that their dealings with Alton should not come to an end, and they forced the loan of 2000*l.* on him.

Lawson Walton, K.C., in reply. The relief given by the Act differs from that which is given in cases which come under the general law.

If the defendant puts his case on the incapacity of Alton by reason of his drinking habits, that is not the ground on which Kekewich J. decided the case. He came to the conclusion on the evidence that there was nothing to shew any stranger dealing with him that Alton had not good business faculties. Kekewich J. came to this conclusion upon the defendant's own evidence. The plaintiffs were prepared to call a number of witnesses to shew that Alton was a man of good business capacity, but it was unnecessary to call them.

VAUGHAN WILLIAMS L.J. We will consider our judgment.

Cur. adv. vult.

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1904. Dec. 5. The judgment of the Court (Vaughan Williams, Romer and Cozens-Hardy L.JJ.) was read by

VAUGHAN WILLIAMS L.J. This is an action brought by "P. Saunders" (a firm) against James William Newbold (the executor of H. T. Alton, deceased), defendant. The action, as appears from the affidavit of Philip Samuel, a partner in the plaintiff firm, sworn in support of a summons under Order XIV. is for the sum of 3025*l.*, the balance of 3300*l.* the amount of a promissory note made by Alton, dated October 3, 1903, in favour of the plaintiffs or order, repayable by twelve consecutive monthly instalments of 275*l.* each, the first to be paid on November 3, 1903, with a default clause whereon default was made. An order was made on the summons directing that the action be set down for trial without pleadings, the defendant to be entitled to raise any defence at the trial.

The defendant by his affidavit alleged (as is the fact) that the sole consideration for the promissory note was a sum of 2000*l.*, and not 3300*l.*, the balance of 1300*l.* being charged in respect of interest, which amounts to more than 100 per cent. per annum. The defendant's affidavit further stated that at the date when the promissory note was signed Alton was suffering from loss of will power, and not in a fit condition, owing to intemperate habits of long standing, to transact business; and it further stated that the deponent verily believed that Alton did not thoroughly understand and appreciate the effect of the transaction in question, and that his condition was known to the plaintiffs, and that they took undue advantage of him having regard thereto.

In addition to the promissory note for 3300*l.* of October 3, 1903, made and given by Alton in respect of the loan transaction mentioned in the affidavit, there was another loan transaction of July 6, 1903, in respect of a loan of that date to be repaid by instalments amounting to 1400*l.*, secured by promissory note for that amount. Of the 1400*l.*, 400*l.* was interest. The instalments were to be five monthly payments of 250*l.*, the first to be paid on August 6, 1903, and the balance of 150*l.* on January 6, 1904, the entire sum to become payable forthwith in case of default.

Kekewich J. gave judgment for the defendant, declaring that all the transactions and acts of the plaintiffs Braham Samuel and Philip Samuel (carrying on business as money-lenders and suing under the registered name of P. Saunders) and Alton ought to be reopened and set aside, and that the executor of Alton ought to be relieved from payment of any sum in excess of the sums actually advanced to Alton and interest thereon at the rate of 10 per cent. per annum; and that, if any such excess had been paid by Alton or by the defendant, the plaintiffs ought to repay the same to the defendant.

The judgment also ordered the following account—namely, of all sums actually advanced by the plaintiffs to Alton, and of all sums received by the plaintiffs from Alton in respect of any such advance; and that in taking the account the defendant be charged with interest at the rate of 10 per cent. per annum on the sums from time to time owing to the plaintiffs, and that the balance due from either party to the other be satisfied. The judgment ordered the plaintiffs to pay the defendant's costs.

Kekewich J. by his judgment, in dealing with the 2000*l.* loan, says in effect that, although "Alton, from an active, shrewd man of business, had fallen into a state of considerable neglect of business and inability to grapple with matters of business," and that this condition was induced by excessive drinking, resulting in liver disease, yet this was not noticeable by an ordinary observer, and therefore that knowledge of this state of things could not be attributed to Philip Samuel, and that Samuel was justified in dealing with Alton as a man of ordinary capacity quite competent to negotiate a loan, and to deal with him as a money-lender.

Kekewich J. then goes on to point out that the rate of interest was very high and the terms severe, since they included a default clause which made the whole sum charged for principal and interest payable on default in payment of any instalment. But he does not hold that this rate and these terms alone made the transaction "harsh and unconscionable" within the meaning of the Act, although he suggests that he

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might have been justified in so doing. The ground upon which the learned judge really does base his judgment is the absence of risk which ought to have been present to the mind of the money-lender. He comes to the conclusion that the absence of risk made the rate of interest excessive, especially when coupled with the default clause, and that therefore the transaction was "harsh and unconscionable" within the meaning of the Act.

The learned judge, in coming to the conclusion that there was no risk although the note was secured by nothing but the note of hand, relies upon the report of Stubbs's agency, obtained by the plaintiffs, which ran thus: "He is regarded as a man of the highest respectability, and is understood to be a large shareholder and director in the firm of Alton & Co., Limited, brewers of this town, Derby. He is reputed to be well-to-do, but at times is inclined to be slow in his payments. He is, however, the owner of property, and is considered a desirable man to deal with in the ordinary way of business. It is not thought that any unreasonable risk would be incurred in granting credit to the extent named." The learned judge also points out that if the plaintiffs had chosen to make inquiries at Alton's bankers they would have discovered that Alton's position was such that lenders for much larger sums than 3000*l.* would run no risks whatever.

The learned judge concludes thus: "It seems to me impossible with that before me to consider that the plaintiffs dealt reasonably with this gentleman. They exacted these very extreme terms from a man who was perfectly competent to pay, and against whom the only thing that any one suggested as regards business was that he was inclined to be slow in his payments; but there was substance behind, and a little slowness was not any very great disadvantage. It seems to me that here I have a case of a money-lender charging a rate of interest which was extremely high; which, if it is not 'harsh and unconscionable' in itself, is 'harsh and unconscionable' when exacted from a man who could obtain money at the ordinary current rates from a banker, or a man who had money at command. On these grounds I think that upon my construction of

the Act I ought to have no hesitation in holding that the transaction is 'harsh and unconscionable,' and ought to be set aside."

Several points have been argued before us. Some relate to the transaction of October 3, some to the transaction of July 6. We propose, in the first instance, to deal with the 2000*l.* loan of October 3. The learned judge has, as we have pointed out, found in favour of the plaintiffs that they were justified in dealing with Alton as a man of ordinary capacity, competent to negotiate a loan, and has preferred to base his judgment, not merely on the fact of the interest being excessive, but on the fact that the absence of risk, having regard to facts as to the financial position of Alton which Philip Samuel knew, or by proper inquiries might have known, rendered the terms of the loan harsh and unconscionable. We have had our attention called to facts to which the learned judge does not expressly refer, but which seem to us to confirm his view as to the absence of risk and as to the amount of knowledge of Alton's financial position which ought to be imputed to the plaintiffs. [His Lordship then referred to the evidence shewing Alton's financial dealings with Sagar and his fellow money-lenders previously to the 2000*l.* loan, and the interests of the several money-lenders in contributing to that loan, the proper inference from which was that all these men were co-adventurers in that loan transaction, and that the knowledge of any of the co-adventurers ought to be imputed to the rest of the party. The judgment then proceeded :—]

Now, having regard to Sagar's position and to his many financial transactions with Alton, as evidenced by Alton's pass-book and the correspondence between Sagar and Alton between January and October, 1903, and Sagar's knowledge of Alton's means to be inferred from all these facts, we cannot doubt but that the money-lenders were fully aware of the absence of risk, and that the rate of interest was excessive, having regard to the risk or absence of risk, and that the terms, having regard to what the money-lenders knew of Alton, were "harsh and unconscionable"; and we think that the 10 per cent. allowed by the order of Kekewich J. is amply sufficient.

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The case of the loan of July 6 is more difficult. Kekewich J. has reopened this transaction, and has ordered it to be included in the account. We cannot accept the argument of Mr. Lawrence that the provision of sub-s. 1 of s. 1, that the Court may, in cases where proceedings are taken by the money-lender for the recovery of money lent, and there is evidence to shew that the interest charged in respect of that sum is excessive, and the transaction (i.e., the transaction in respect of which the money-lender brings the action) is harsh and unconscionable, not only reopen that transaction, but also reopen any account taken between the same parties in any matter, however foreign to the transaction sued on. We think that the account reopened must be relevant to the transaction in respect of which the action is brought.

The section seems to us intended to give the defendant relief by way of defence in the action which the money-lender has brought. This seems to be rather confirmed than otherwise by that part of the section which says that the defendant may reopen that transaction, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and to create a new obligation. Sub-s. 1 of s. 1 of the Act seems to us to give relief only in respect of the transaction the subject of the money-lender's action, and we think that, as the power to reopen is limited to that transaction, so the account can only be taken in that transaction or in some transaction part and parcel of the same, or which, even though it may include new obligations, yet comprised what purported to be a close of the dealings in respect of which the money-lender is taking proceedings. We should point out that Kekewich J. in his judgment does not go into the question whether the loan really of 1000*l.* but nominally of 1400*l.* was harsh and unconscionable. It is true that sub-s. 2 provides that any Court in which proceedings might be taken by a money-lender may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised in an action by a money-lender for the recovery of money lent; and in our judgment this sub-section applies even to a case where the loan has been

repaid. This limitation is not a limitation to cases in which the money-lender has an unsatisfied cause of action, or there is some one liable to be sued; the limitation is only to a Court in which proceedings might be taken by a money-lender for recovery of money lent. Given such a Court—i.e., given a Court having jurisdiction—that Court may exercise at the instance of the borrower the powers given by the 1st sub-section. Such powers clearly cover a power to order repayment by the money-lender, and we cannot see that this power is in any way excluded by the words at the end of the section, "notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived." Mr. Hohler, in arguing the contrary, relied very much on the word "liable" in sub-s. 2 of s. 1. The words of this sub-section are: "Any Court . . . . may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent"; and he relied also upon the words at the end of this sub-section as to the Court entertaining an application "notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived." As to the force of the word "liable," it seems to us that "liable" cannot be read as meaning liable in fact. So to read it would be to exclude from the power of the Court given under sub-s. 2 the power which the Court clearly has under sub-s. 1 to order repayment by a money-lender. Moreover, one must not forget that the Money-lenders Act, 1900, is an amending Act, amplifying the powers heretofore exercised by the Court of Chancery; and it is clear that the Court of Chancery did not allow the fact of repayment to prevent the reopening of a transaction entered into by a borrower whom the Court deemed from the circumstances of the case unable to protect himself. As to the words at the end of the section, we think they only mean that the borrower may obtain relief, not only when he is sued, but before he is sued.

But, assuming as we do that the defendant, by taking proper steps could, notwithstanding payment, have obtained an order reopening the transaction, provided he had counter-claimed, or

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upon due notice made an application in the action to that effect, he did not do so. Neither did he make any application at the trial to amend. The fact is that the case of the loan of July 6 being "harsh and unconscionable" was not made at the trial, and the judgment of Kekewich J. does not deal with the question; and in these circumstances it is impossible for us to allow an amendment now. The order made under Order XIV. is limited to the defences of the defendant.

We think, therefore, that the judgment ought to be amended by striking out so much of it as refers to the loan of 1400*l.* which was repaid, but this should be without prejudice to the right of the defendant Newbold, as executor of Alton, to bring an action to reopen that transaction if he be so advised. With regard to costs, we think that justice will be done by not disturbing the order of the Court below as to costs, and giving no costs of the appeal.

Solicitors: *B. Barnett; Fowler & Co., for Eddowes & Sons, Derby.*

G. I. F. C.

ROBINS *v.* GODDARD.

THE decision of Farwell J. in this case, reported [1904] 2 Ch. 261, was reversed by the Court of Appeal on December 14, 1904. The hearing in the Court of Appeal is reported in the March part of the King's Bench Division, [1905] 1 K. B. 294.

In re DOUGLAS. DOUGLAS *v.* SIMPSON.

KEKEWICH J.

1904

Dec. 9, 16.

[1904 D. 1789.]

Charity—Mortmain—Gift for Maintenance of Churchyard—Statute—Implied Repeal—Gifts for Churches Act, 1803 (43 *Geo.* 3, *c.* 108), *s.* 1—*Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *s.* 7.

The restriction contained in the Gifts for Churches Act, 1803, s. 1, is impliedly repealed by s. 7 of the Mortmain and Charitable Uses Act, 1891 :—

Held, therefore, that a residuary gift by a testatrix of property exceeding 500*l.* in value for the maintenance of a churchyard was a valid charitable gift.

ADJOURNED SUMMONS.

Under and by virtue of her marriage settlement, dated April 16, 1891, Sybilla Lucy Douglas had, in the events which had happened, a general power of appointment over the funds comprised in the settlement, subject to the life interest of her husband Robert Gordon Douglas.

By her will, dated August 3, 1898, S. L. Douglas appointed her husband sole executor thereof, and gave and bequeathed the whole of her moneys and property to him for his life. The testatrix then bequeathed legacies amounting to about 5770*l.*, and after making certain specific bequests gave the residue as follows: "any little money left for Milstead churchyard."

The testatrix died on October 19, 1902.

The property comprised in the marriage settlement amounted to about 8386*l.*, and the free personal estate to 1046*l.* or thereabouts; so that the residue amounted to about 3662*l.*

This summons was taken out by the husband of the testatrix, R. G. Douglas, as sole executor and beneficiary for his life under the will for the determination of the questions—(1.) whether the will operated as an exercise of the power conferred by the settlement; and (2.) whether the bequest for

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Milstead churchyard was a valid charitable bequest, and, if so, what property passed thereunder.

The Court held that the will operated as an exercise of the power conferred by the settlement; and the second question came on for argument.

Church, for the plaintiff. The gift in favour of Milstead churchyard is a good charitable gift of the whole of the residuary estate of the testatrix. No restricted construction can be put upon the words "any little money left," for that would be to make the gift void for uncertainty. Formerly under the Gifts for Churches Act, 1803 (43 Geo. 3, c. 108), s. 1, the gift, being for the maintenance of a churchyard, would have been good to the extent of 500*l.*: see *In re Vaughan* (1); *Champney* v. *Davy* (2); but that enactment is impliedly repealed and all such limitation removed by the general provision in s. 7 of the Mortmain and Charitable Uses Act, 1891.

J. J. Adams, for pecuniary legatees.

MacSwinney, for the next of kin. The residuary gift in favour of the churchyard is bad as exceeding the limit of 500*l.* imposed by the Act of 1803, or at all events it is good only to the extent of 500*l.* allowed by the Act. There is no implied repeal of the Act of 1803 to be found in the Act of 1891, which does not expressly mention the Act of 1803, nor contain any provisions inconsistent with it. In the case of *In re Smith's Estate* (3) it was held that the proviso at the end of s. 1 of the Act of 1803 excepting "women covert, without their husbands" from the power conferred by the Act to make gifts of land or personalty for churches was not repealed by the operation of s. 1, sub-s. 2, of the Married Women's Property Act, 1882. The ratio decidendi in that case makes it a direct authority applicable to the present case.

R. J. Parker, for the Attorney-General.

[Reference was also made to *In re Cadogan* (4) and *Commissioners for Special Purposes of Income Tax* v. *Pemsel*. (5)]

(1) (1886) 33 Ch. D. 187.
(2) (1879) 11 Ch. D. 949.
(3) (1887) 35 Ch. D. 589.
(4) (1883) 25 Ch. D. 154.
(5) [1891] A. C. 531.

KEKEWICH J. The first thing is to ascertain what the testatrix intended according to the language which she has used in her will. Without guessing more than I am obliged to do, I must say that she never really intended to give for the repairing or improving of the churchyard so much as her residuary estate appears now to consist of. She says "any little money." It was not her intention to leave between 3000*l.* and 4000*l.* for a purpose which would have been well answered by a small proportion of that sum. But I have to construe the will as it stands. It is a thoroughly inartistic will, and contains a gift in the first instance of the whole of her money and effects to Robert Gordon Douglas for his life, shewing that the testatrix had before her the intention of disposing of the whole of the property which she had to give, and the fact that she afterwards proceeded to give legacies indicates that she was following out the same idea of disposing of all her property. She gives pecuniary legacies and certain specific legacies, and then she uses these words, "any little money left," and gives that for the repair of Milstead churchyard. To my mind it is a practical way of putting the matter to say that the question is, if she did not mean to dispose of the residue of the personal estate, what did she intend to dispose of? It is for those who say that she did not dispose of the whole residue to make out what she did not dispose of. That is enough to compel me to come to the conclusion that it is a true residuary gift.

That being so, the real question, on which the assistance of the Attorney-General has been afforded to-day, is whether it is a good gift and how effect is to be given to it. The argument, which is well worth attention, is this. Before the Act of 43 Geo. 3, c. 108, a testator could not have given money in this way at all: it would have been bad as a gift in perpetuity. But the Act enables personal estate to be given for such purposes to the extent of 500*l.* The question is as to the balance above that sum. The restriction in the Act is to prevent any person making several gifts of 500*l.* That is the only real meaning to be attached to it. Counsel for the next of kin says that the Mortmain and Charitable Uses Act, 1891, which is an enabling statute, cannot be read as repealing 43 Geo. 3, c. 108, which it

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does not expressly mention, and he refers to the case of *In re Smith's Estate* (1), before Stirling J., where it was held that this very Act of 43 Geo. 3, c. 108, was not impliedly repealed by the provisions of the Married Women's Property Act, 1882. I think there is a complete answer to that, and that *In re Smith's Estate* (1) has no application to the present case. It has been pointed out that the Act of 1891 abolishes the distinction between pure and impure personalty, and yet it expressly enacts in s. 7 that "any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land." Treating this as money in mortmain, I have there the express direction that the pure personalty or the impure may be devoted to charitable uses, and the intention of the Legislature was that this should be done. But in *In re Smith's Estate* (1) Stirling J. was dealing with an Act enabling certain things to be done which without the Act could not be done at all. This was the object which the Married Women's Property Act, 1882, was intended to effect, and the learned judge held that the provisions of the Act of 43 Geo. 3, c. 108, were not affected by the provisions of the Married Women's Property Act, 1882. Here I am dealing with an Act which purports to amend certain Acts previously passed on the same subject, and it must be assumed that the Legislature was aware of those Acts and intended to enact an entirely new code upon the subject. Therefore, on that ground, I am not guided by the decision of Stirling J. in *In re Smith's Estate* (1), and am of opinion that this residuary gift is a good charitable gift.

The gift being good, and the amount being more than could be required for the purpose specified, I must direct an application for a scheme on the death of the tenant for life.

Solicitors: *Church, Adams & Prior; Soames, Edwards & Jones; Solicitor to the Treasury.*

(1) 35 Ch. D. 589.

C. C. M. D.

In re W. TASKER & SONS, LIMITED. HOARE *v.* W. TASKER & SONS, LIMITED.

KEKEWICH J.
1904
Dec. 14, 16, 20.

[1903 W. 2227.]

Company—Debentures — Transfer or New Issue — Debentures paid off and handed back to Company with Blank Transfers—Subsequent Transfer of Debentures by Company filling in Blanks.

A company issued debentures which were to be a first charge on the property of the company, who were not to be at liberty to create any mortgage or charge in priority to or pari passu with these debentures. Some of the debentures were issued as security for a loan; the loan was paid off by the company, and the debentures handed back to the company with transfers having blanks for the names of the transferees. Subsequently the company, for value received, handed over the debentures together with the transfers, with the blanks filled in by the company, to persons who had applied for debentures :—

Held, that this transaction was not a transfer of original debentures, but a creation of new debentures, and that the holders of the new debentures were not entitled to rank pari passu with the original debenture-holders.

FURTHER CONSIDERATION and summons in a debenture-holder's action.

The question, arising on the master's certificate in the action, was whether a transaction entered into by the company, as subsequently mentioned, on the occasion of the payment off and reissue of certain debentures, constituted a transfer of them as original debentures with the rights attaching thereto, or an issue of new debentures.

W. Tasker & Sons, Limited, was incorporated in April, 1896, and by the articles of association the directors had extensive powers to borrow money not exceeding the nominal amount of the capital, and to secure the repayment of the same by the issue of debentures charged upon the property of the company, and any debentures might be issued to or deposited with any person lending money to the company by way of security, collateral or otherwise.

The material articles were as follows :—

Art. 49: "Every debenture or other security created by the

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company may be so framed that the same shall be assignable free from any equities between the company and the original or any intermediate holders."

Art. 112 (*k*): "The directors shall have power to borrow or raise any sum or sums of money on such security and upon such terms as to interest or otherwise as they may deem fit, and for the purpose of securing the same and interest, or for any other purpose, create, issue, make, and give respectively any perpetual or redeemable debentures or debenture stock, or any mortgage or charge on the undertaking or the whole or any part of the property (present or future) or uncalled capital of the company, and any debentures or debenture stock may be issued to or deposited with any person lending money to the company by way of security, collateral or otherwise."

The company was empowered to issue first mortgage debentures up to 35,000*l.*, and in July, 1896, the company issued debentures to the plaintiff and others subject to the following conditions (inter alia) indorsed thereon:—

"(1.) This debenture is one of a series of debentures of 20*l.*, 50*l.*, and 100*l.* each, issued or about to be issued by the company for an aggregate amount of 35,000*l.*, and the said debentures are all intended to be in the same form.

"(2.) The debentures of this series shall rank pari passu as a first charge upon the premises within charged, without any preference or priority one over another, and shall, until the moneys hereby secured shall become payable, be a floating charge upon such premises, but so that the company is not to be at liberty to create any mortgage or charge thereon in priority to or pari passu with the said debentures."

"(4.) A register of the debentures will be kept at the company's registered office, wherein there will be entered the names, addresses, and descriptions of the registered holders and particulars of the debentures held by them respectively.

"(5.) The registered holder of this debenture will be regarded as exclusively entitled to the benefit thereof, and the company shall not be bound to enter in the register notice of any trust affecting the debenture, or recognise any right therein.

"(6.) Every transfer of this debenture must be in writing

under the hand of the registered holder hereof or his legal personal representative."

"(9.) The principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original and any intermediate holder hereof, and the receipt of the registered holder for such principal moneys and interest shall be a good discharge to the company."

In May, 1899, the company required further capital, and obtained loans amounting to 1700*l.* from two gentlemen named Ashby and Herbert, to whom they issued debentures of the above series to twice the amount of their respective loans.

The total amount of debentures issued by the company did not exceed the limit of 35,000*l.* From time to time the company paid off parts of these loans, and upon each occasion received back from the lender debentures of twice the nominal value of the money so repaid, and also, by request of the company, a transfer of such debentures executed by the lender, but leaving a blank for the name and address of the transferee.

As the company received applications for new debentures, in payment of the amount secured, it issued to such applicants for full face value some of the identical debentures which had been returned by the first lenders, together with the transfers in respect thereof, with the blanks filled in by the company and duly registered. Others of the debentures were deposited by the company (but without the corresponding transfers) as security to persons who made advances.

In July, 1903, a receiver and manager of the company's business was appointed at the instance of the plaintiff, and in August, 1903, the company passed a resolution for voluntary winding-up.

In the master's certificate the plaintiff and other original holders of the debentures were entered in the 1st schedule as holders of first mortgage debentures, and the various holders of returned debentures which had been dealt with as above mentioned were entered in parts 1, 2, 3, and 4 of the 2nd schedule. The claim of the latter to rank as debenture-holders pari passu with the holders entered in the 1st schedule was adjourned into Court.

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Ashton Cross, for the plaintiff.

Sheldon, for the debenture-holders named in the 1st schedule. The important circumstance is that the money due on the debentures was repaid by the company and not by the new holders of the debentures, and it follows from this that the transaction was not a transfer, but a fresh issue of debentures; and consequently the holders of these debentures are not entitled to rank pari passu with the holders of the first issue of debentures. The company was in the position of a mortgagor entitled to a reconveyance; but after reconveyance it could not keep the security alive for its own benefit to the prejudice of other mortgagees. By reconveyance and payment off the security was at an end, and any subsequent transfer by the company was ultra vires. The new debenture-holders can have no better right to participation than the company purchasing its own debentures had in *In re George Routledge & Sons, Ld.* (1) The execution of the transfer to the company at the time of repayment is evidence of intention of merger. The reissue of a debenture paid off is prevented by condition 2, and as between debenture-holders condition 9 is not applicable. The transaction was a fresh issue, and not a further issue of the original debentures by way of collateral security as in *In re Regent's Canal Ironworks Co.* (2)

Peterson, for debenture-holders in the 2nd schedule. The present holders of these debentures had no notice of any irregularity, and the debentures are good in their hands. The case of *In re George Routledge & Sons, Ld.* (1), does not apply, because in that case the company themselves became the registered transferees and holders of the purchased debentures, whereas in the present case the company have never placed themselves in that position. Any restriction of the company's borrowing powers only binds the shareholders, and, even if the action of the company was ultra vires, the holders of the debentures when registered are entitled to a first charge, and to rank pari passu with the first mortgage debentures.

One of the debenture-holders applied to the company for her debenture before there had been any repayment and return of

(1) [1904] 2 Ch. 474. (2) (1876) 3 Ch. D. 43.

it to the company, and it is submitted that she, at all events, is entitled to a first charge.

M. J. Muir Mackenzie, for other debenture-holders in the 2nd schedule. In the case of *In re George Routledge & Sons, Ld.* (1), the debentures were transferred to the company, and there was therefore a merger, so that the subsequent issue of them was necessarily bad. In the present case the company have shewn an intention to keep the debentures alive, and consequently there is no merger: *Thorne* v. *Cann.* (2) The deposit of debentures without transfers was a deposit by way of collateral security within art. 112 (*k*) of the articles of association.

Manson, for other debenture-holders in the 2nd schedule. In this case there could be no merger, for the company never took a transfer and the legal title remained outstanding. Conditions 5 and 9 operated in favour of these debenture-holders, and gave them equal rights with the other holders of debentures in the same series. In *In re George Routledge & Sons, Ld.* (1), there was no condition as to equities similar to that in condition 9.

Gatey, for the trustee of the debenture trust deed.

KEKEWICH J. The question in this case is of some importance to those interested in the issue of debentures, and I think that it is completely new. I am not considering any claim against the company. All these debentures specified in the 2nd schedule in the certificate, parts 1, 2, 3, and 4, may be perfectly good debentures as against the company, and yet the point which I have to decide may be decided against the holders. The question is whether they are to rank pari passu with the debentures specified in the 1st schedule.

The articles of association conferred very large borrowing powers on the company, and expressly authorized issue of debentures by depositing them as security for money advanced.

I must take the master's certificate as it stands. The claims are for convenience divided into four different parts, but they all fall under one head, and there is no distinction in substance between the four different classes. The company issued first mortgage debentures for 35,000*l.*, and from time to time paid off some of those debentures. The certificate is distinct as

(1) [1904] 2 Ch. 474. (2) [1895] A. C. 11.

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to that. On each payment off the company requested the debenture-holders whom they had paid off to execute a blank transfer, i.e., a transfer containing the name of the transferor but leaving a blank for the name of the transferee. At a later date, as part of an independent transaction, the company borrowed from third persons, and on such borrowing filled in the names of those borrowers as transferees and registered each as the transferee. Does that constitute a transfer of the original debenture, or an issue of a new debenture belonging to a series different from the original debentures? I presuppose that there is such a series, and as a matter of fact there is no doubt about it. Looking at one of these impugned debentures, it appears that each holder of them is told as part of his contract, not only with the company but with the other holders, that he is to have a debenture which will rank pari passu with all the other debentures of that issue, but that no other debentures are to be issued other than this series which shall rank pari passu. I have to consider whether what has been done constitutes an attempt to evade the condition, and make other debentures rank pari passu with those held under the first issue. There is, as I have said, no distinction between the different classes in the 2nd schedule. In every case the transaction was the same in substance. The debt was paid off by the company, and there was a reissue for advances, so that the same piece of paper was reissued and a transfer executed in the manner I have mentioned. Buckley J. had recently before him a case of *In re George Routledge & Sons, Ld.* (1), which was quite different from this, but which no doubt throws some light upon it. There the company had gone a step further. In that case the company, having purchased debentures issued by themselves, took an assignment of them to themselves and then reissued them, and the learned judge held that that was undoubtedly bad. He expressed himself in plain language (2): "The result to my mind is that the debt and the security were both absolutely gone." No doubt those who contested the validity of the debentures in question in that case put it on the ground of merger, but the learned judge did not state any principles or cite any cases on that difficult branch of the

(1) [1904] 2 Ch. 474. (2) [1904] 2 Ch. 479.

law. What he did say was that both the debt and the security were absolutely gone, and, although the merger doctrine may have been present to his mind, he did not go upon any technical ground of that kind, but went on the substance of the thing—that the debt was paid off. To my mind, the same result follows here. I think that everything depends on the payment off. No doubt it was an acceleration. The debt was not due by the terms of the debentures, but the company could at any time buy up its debentures, if the creditors were willing, so as to prevent any charge against the company. Of course the debt is gone, and I think that the security must be also gone. It was perfectly competent for the company to arrange for the transfer of the debentures to any creditor. In that case the company would have been merely an intermediary between the person who desired to transfer and the person who wished to advance the money. If that were the substance of the transaction, there would be no difficulty about it, but I find that there was nothing paid at the time. At a later period some one was found to advance the money. I cannot see that there was any power in the company to do anything of the kind. I am not considering what the rights of these debenture-holders are against the company; it may be that as against the company the registered holders are undoubtedly right. It seems to me that upon repayment the debt was gone, and that when the company borrowed further money, whether by depositing the debentures as collateral security or by issuing them in the ordinary way, they issued new debentures. I do not think the case of the debenture applied for prior to the repayment by the company is distinct from the others. Therefore I hold that the certificate is right, and that the only persons entitled to rank as holders of this issue of debentures for 35,000*l.* are those mentioned in the 1st schedule.

Solicitors: *Wood & Wootton; E. Bevir; Taylor, Hoare & Pilcher; Mackrell, Maton, Godlee & Quincey; H. C. Turner & Co.; Percy J. Nicholls, for A. J. Ellaby, Southampton.*

C. C. M. D.

FARWELL J.

1905
Jan. 11.

In re EVANS (A SOLICITOR).

Practice—Solicitor—Costs—Taxation—Public Body—Right to elect—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, August*, 1882, *r.* 6.

The right of a solicitor under rule 6 of the general order under the Solicitors' Remuneration Act, 1881, to elect to charge according to the old system as altered by Sched. II. to the order, instead of by scale, is not taken away by the fact that his clients are a public body or persons in a fiduciary capacity; nor is it the duty of public bodies or persons in a fiduciary capacity to prevent their solicitors from so electing.

A school board instructed a solicitor to act for them in the matter of a purchase of a school site for 350*l.* The solicitor duly signified to the board his election under rule 6 of the general order to charge on the old system as altered by Sched. II. The board consented. The matter was completed, and the solicitor sent in a bill for 50*l.* 2*s.* On taxation the taxing master reduced the bill to 13*l.*, the amount of the scale charge and disbursements, and stated in answer to objections that the school board, being a public body charged with the administration of public funds, were in a fiduciary position, and it was their duty not to employ a solicitor who insisted on the more expensive mode of payment:—

Held, that no such duty was cast on a public body or persons in a fiduciary position, and that the bill must be referred back to be taxed according to the solicitor's election.

THIS was a summons by a solicitor to vary a taxing master's certificate.

The Llanywicke School Board agreed to purchase a piece of ground for a school site for 350*l.*, and on July 9, 1903, their clerk wrote to the applicant, D. L. M. Evans, requesting him to act as the solicitor of the board in the matter. Evans wrote in reply:—

"Gough to Llanywicke School Board.

"With reference to your letter of the 9th inst. re the above matter, I beg to state that my charges in the above matter shall be according to the present system as altered by Sched. II. of the general order made in pursuance of the Solicitors' Remuneration Act, 1881."

This letter was reported to the board, and agreed to at a meeting held on August 27, 1903.

The clerk then directed Evans to proceed, and the title was examined and the purchase completed in the usual way.

On June 18, 1904, Evans delivered to the education committee of the county council of the county of Glamorgan, who had succeeded to the school board, his bill of costs amounting to 50*l.* 2*s.* The education committee applied for the taxation of this bill for the purposes of their audit, and the taxing-master allowed only 13*l.*, being the scale charge under Sched. I. to the order, together with proper disbursements.

Evans took in objections that the letter above set out fulfilled the conditions of rule 6 of the general order under the Solicitors' Remuneration Act (1); that the board had accepted the solicitor's election; that there was nothing unreasonable or improper in their doing so; and the committee of the Glamorganshire County Council stepped into the shoes of the school board, and were bound by the arrangement made by them. He submitted that the school board could not properly be said to be in a fiduciary position.

In his answers to these objections the taxing master said: "The objections raise a question of principle of some importance, viz., as to the right of a public body, such as the Llanywicke School Board, dealing with public moneys to employ a solicitor on ordinary conveyancing work on other than usual terms, and to act upon an 'election' by the solicitor to charge under Sched. II. to the Solicitors' Remuneration Order instead of taking the scale charge under Sched. I. The objections if they are well founded seriously affect the efficiency of the Supreme Court Taxing Office in a class of cases now coming in with increasing frequency, viz., the taxation of costs of solicitors acting for local authorities, and go a long way towards substituting the opinions and wishes of the local authority for the ordinary process of determining such question

(1) General Order under Solicitors' Remuneration Act, 1881:—

"(6.) In all cases to which the scales prescribed in Sched. I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by Sched. II. hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this order."

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on taxation." He then stated the facts of the case, and a letter from the education committee to their own solicitor supporting the contention of Evans, and continued: "I cannot accede to the contention that the school board could employ any solicitor they thought fit, leaving it to the solicitor to decide on what scale he would be paid. I think, on the contrary, that the board, as custodian of public funds to be applied for public purposes, were bound to avoid unusual expense, and to employ some one else if the solicitor they favoured would not work on ordinary terms. The solicitor in his objections says that a school board cannot properly be said to occupy a fiduciary position; and this I presume is the view of the school board and their successors, the education committee of the county council. I differ from them entirely: this taxation, as are many similar ones, is for the purpose of satisfying the Local Government Board auditor that the costs are proper to be allowed. If such bodies are free to make unusual terms with a solicitor or other person employed by them for analogous purposes, and to tie the taxing master's hands by their decisions on these subjects, taxation in such cases becomes a farce, and the audit misleading.

"A somewhat similar question arose in *In re Frank James & Sons* (1), and Kekewich J. there upheld the taxing master in declining to be bound by the client's directions and in allowing only ordinary remuneration. It has been held that a liquidator cannot act on such an election without leave of the judge: *In re United Kingdom Land and Building Association.* (2) So also as to sales in an administration action: *In re Rackham.* (3)

"I should not recognise such an election in ordinary trustee's charges and expenses, but it is in practice not attempted.

"I can discover nothing in the circumstances of the case to make it an exception. If this particular solicitor would not do the work for the usual scale charge, there were plenty of other solicitors in Wales, equally competent, who would gladly have undertaken the conveyancing business of the school board on the ordinary terms of Sched. I. It is not stated that the

(1) [1903] W. N. 99. (2) (1888) 40 Ch. D. 471.
(3) [1889] W. N. 214.

school board thought it their duty to make inquiry about this. They simply accepted the notice from this solicitor, although it must have been obvious that the notice was given in the interest of the solicitor and to enable him to charge more than he would if he took the retainer on ordinary terms.

"There was no obligation to employ him, and I think the board did not exercise ordinary prudence after receipt of the notice.

"I think the school board did occupy a fiduciary position and could not rightly act on this election. I therefore overrule the objections."

The solicitor took out this summons asking that the objections might be allowed.

Owen Thompson, for the summons. Rule 6 of the general order is quite plain. It expressly applies to all cases to which the scales apply. There is no reason whatever for introducing the exception which the taxing master suggests in the case of public bodies, trustees, or persons in a fiduciary position. Of the cases mentioned by the taxing master, *In re Frank James & Sons* (1) was a case where an arbitrator was seeking to charge commission; *In re United Kingdom Land and Building Association* (2) was the case of a liquidator, who could not appoint a solicitor at all without the leave of the Court, and it was held he ought to have applied to the judge before allowing the solicitor to exercise this option; *In re Rackham* (3) was the case of a sale by the direction of the Court in an administration action.

The question does not seem to have been ever directly raised, but there are numerous cases as to the validity of a notice under rule 6 where it was assumed that the rule applied to cases within the exception which the taxing master wishes to establish. In *In re Metcalfe* (4) and *In re Love* (5) the clients were trustees, in *Hester* v. *Hester* (6) they were mortgagees, and in *In re Stewart* (7) and *In re Denne and the*

(1) [1903] W. N. 99.
(2) 40 Ch. D. 471.
(3) [1889] W. N. 214.
(4) (1887) 36 W. R. 137.
(5) (1889) 40 Ch. D. 637.
(6) (1887) 34 Ch. D. 607.
(7) (1889) 41 Ch. D. 494.

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Secretary of State for War (1) they were public bodies. On principle there is no ground for the proposed exception.

The education committee did not appear.

FARWELL J. Rule 6 of the general order under the Solicitors' Remuneration Act provides as follows: [His Lordship read the rule.] In this case the taxing master has come to the conclusion, in some way which I fail to understand, that this rule must be qualified by adding the words, "except in the case of a school board, or local authority, or of trustees or other persons in a fiduciary position." I do not see how he is justified in adding any such words to the rule in question. The case of *Hester* v. *Hester* (2), before Kay J., has a considerable bearing on the present case. That was a case of a mortgagee, and the decision was that notice of election duly given by a solicitor to his client, the first mortgagee, is binding on a puisne mortgagee and the mortgagor. Kay J. says: "Election is a matter entirely between the client—here the clients are the first mortgagees—and his solicitor. An election only puts the solicitor in the position in which he was before the scale was adopted; and there appears to me to be no hardship in saying that if the election is properly made as between the solicitor and his own client, a first mortgagee, it would be binding as between the solicitor and a subsequent mortgagee. In my opinion it would be binding both as against the mortgagor and the second mortgagee."

In the face of that I cannot understand why it is that the taxing master appears to have thought there was something wrong in the solicitor making, and the local authority assenting to, this election. It often happens that in small matters it would not pay the solicitor to do the work for the scale fee under Sched. I.; for instance, in this very case the scale fee only amounts to five guineas. A solicitor is not bound to do the work for the scale fee prescribed by the order, but is free to exercise the option given to him by rule 6. On the other hand, it is open to the client to refuse or assent to an election by the solicitor; and, although he has so assented, he still has the security that the taxing master on taxation will see that

(1) (1884) 1 Times L. R. 23. (2) 34 Ch. D. 607, 613.

only proper charges are allowed. Here, however, the taxing master says: "I should not recognise such an election in ordinary trustee's charges and expenses." I confess that I do not see on what possible grounds the taxing master assumes an authority to strike out the provisions of the rule in cases where trustees or local authorities are concerned. *Hester* v. *Hester* (1) was an express decision with reference to the case of a mortgagee. In *In re Metcalfe* (2) there had been an administration judgment, and in *In re Stewart* (3) the client was a public authority, but no objection to the application of the rule was taken on those grounds. No case was cited to me which shewed any reason why there should be any exception to the rule in the case of local authorities or other public bodies. The taxing master relied on the two cases of *In re United Kingdom Land and Building Association* (4) and *In re Rackham* (5); but both those cases are quite distinguishable from the present. Where an estate is under the control of the Court, or there is pending before the Court a matter in which resort can be had to the judge, it may well be that the trustee or liquidator, or the solicitor himself, ought to go to the judge and obtain his sanction to the employment of the solicitor on these terms. The case of *In re Frank James & Son* (6) in the *Weekly Notes* is not fully reported, but so far as I can see it has reference to some particular items in the bill of costs which the parties wished to be paid according to an agreement between them, and which the judge thought ought not to be allowed; it has nothing to do with rule 6.

I decide this case upon that rule, and I do not see what jurisdiction the taxing master has to deprive solicitors of the option given to them by that rule, or what justification he has for charging the local authority with breach of duty for assenting to the exercise of that option.

The bill must go back for taxation according to the election made by the solicitor.

Solicitors for applicant: *Neave & Bretherton.*

(1) 34 Ch. D. 607.
(2) 36 W. R. 137.
(3) 41 Ch. D. 494.
(4) 40 Ch. D. 471.
(5) [1889] W. N. 214.
(6) [1903] W. N. 99.

J. R. B.

FARWELL J.

1904

Dec. 16, 17, 20.

RAINFORD *v.* JAMES KEITH & BLACKMAN COMPANY, LIMITED.

[1904 R. 878.]

Company—Articles—Transfer of Shares—Registering Transfer without Production of Share Certificate—Note on Certificate—False Declaration—Reasonable Inquiry — Liability of Company — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 22, 30.

The articles of a limited company provided that the company should not be bound to regard or see to the execution of any trusts, whether express, implied, or constructive, to which any share might be subject; and that before registration of any transfer of shares, the instrument of transfer should be left at the office of the company, together with any evidence the company might require to prove the title of the transferor. C. was the registered holder of shares in the company, and in May, 1903, he deposited the certificate of his shares, and an executed transfer of the shares with the date in blank, with R. as security for a loan. Upon the certificate was this note: "Without the production of this certificate no transfer of the shares mentioned therein can be registered." In June, 1903, C., unknown to R., sold the shares to Y., and lodged with the company for registration a transfer to Y. of the shares, without the certificate, but with a written declaration by C. stating that the certificate was in the possession of a friend, but not as security for a loan or other consideration. C. was a servant of the company, and the directors, acting in good faith, accepted his declaration as sufficient and registered the shares in Y.'s name, and issued to him a fresh certificate for the shares. In September, 1903, R. filled in the date of his transfer and lodged it with the company for registration, together with the original certificate; but the company declined to register his transfer because the shares had been already transferred to and registered in the name of Y. In an action by R. against the company for damages for having wrongfully registered the shares in Y.'s name:—

Held, that, if the company owed a duty to R. to take reasonable and proper care, they did not discharge it in accepting C.'s declaration as a sufficient explanation for the absence of the certificate:

But *held*, that the company were not liable, for that the note on the certificate did not amount to a representation to or contract with the holder of the certificate that the shares would not be transferred without production of the certificate, but was only a warning to the owner of the shares to take care of the certificate because he could not compel the company to register a transfer without its production.

THE defendant company were incorporated in July, 1890, under the Companies Acts, 1862 to 1886, with memorandum

and articles of association; and the articles relevant to the present case were the following:—

"13. The company shall not be bound to regard or see to the execution of any trusts, whether express, implied, or constructive, to which any share may be subject."

"21. Subject to the restrictions of these presents, any member may transfer all or any of his shares by instrument in writing in common form."

"24. Before registration of any transfer, the instrument of transfer shall be left at the office of the company, together with any evidence the company may require to prove the title of the transferor, and the transfer shall thenceforward be kept by the company." (1)

In July, 1901, one Casmey was the registered holder of 120 fully paid ordinary shares in the company. The certificate of his shares stated in the body of it that he was the proprietor of the shares "subject to the memorandum and articles of association of the company," and had printed at the foot of it this note: "Without the production of this certificate no transfer of the shares mentioned therein can be registered."

In September, 1901, Casmey deposited the certificate, and also a certificate of fifty preference shares in the company, with the plaintiff as security for a loan, and at the same time handed the plaintiff a duly executed transfer of both the ordinary and preference shares to the plaintiff, the date only being left in blank. In May, 1903, the plaintiff received a payment on account from Casmey, and gave up to him the certificate of the fifty preference shares, retaining the certificate of the 120 ordinary shares as security for 100*l.*, and Casmey gave him a fresh transfer of these shares duly completed in all respects except that the date was left in blank.

On June 25, 1903, Casmey sold his 120 ordinary shares to one Younie for 90*l.*, and lodged a transfer of these shares to Younie with the company for registration, without the certificate, but with the following written declaration:—

"I hereby declare that my share certificate No. 50 for 120 ordinary shares in James Keith & Blackman Company, Limited,

(1) See art. 16 of Table A in Sched. I. of the Companies Act, 1862.

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is in the possession of a friend of mine; that I have signed no transfer deed in respect of the said shares excepting only that deed in favour of Mr. Alexander Younie; and that the said shares are not held by my friend as a charge against any loan or other consideration.

"In consideration of your honouring the transfer deed in favour of Mr. Younie and issuing a certificate in his favour, I hereby agree to hold you indemnified against all loss arising from the non-return of my certificate, No. 50.

"(Signed) W. H. Casmey."

Casmey was a trusted servant of the company and had been in their employ some sixteen years; and the board of directors, acting in good faith, accepted his declaration as a sufficient explanation for the non-production of the certificate. Accordingly, without further inquiry, they passed the transfer to Younie and registered the shares in his name, and issued to him a fresh certificate for them.

In September, 1903, the plaintiff, hearing that Casmey was in financial difficulties, filled in September 2, 1903, as the date of his transfer, and sent it with the original certificate to the company in order that the shares might be registered in his name. The company declined to register the shares in the plaintiff's name on the ground that the shares had been transferred to and registered in the name of Younie in the previous June. This was the first intimation to the plaintiff that Casmey had dealt with the shares. Thereupon the plaintiff brought this action against the company, alleging that the company registered the transfer to Younie without making proper inquiry for the certificate and without any sufficient account being given for its non-production, and claiming (inter alia) damages against the company for wrongfully registering the transfer to Younie and refusing to register the transfer to the plaintiff.

The statement of claim also contained an allegation that the company had notice of the plaintiff's charge on the shares before the transfer to Younie was registered, and that Casmey transferred the shares to Younie by arrangement with the company, and that the 90*l.* was paid to the company in part

satisfaction of a debt due by Casmey to the company; but Farwell J. held that the evidence failed to establish this allegation, and it does not call for a report.

Clarkson, for the plaintiff. Casmey's declaration gave the directors distinct notice that the certificate was in the hands of a third person. It was the duty of the directors to exercise reasonable care and to see that the transfer was in order.

[*Upjohn, K.C.*, for the defendants, referred to the dictum of Lord Cairns in *Shropshire Union Railways and Canal Co.* v. *Reg.* (1)]

No doubt the directors can in their discretion register a transfer without the production of the certificate, but they must exercise that discretion in a reasonable manner. Here the transfer was not accompanied by the certificate. It was "not in order": *Société Générale de Paris* v. *Walker* (2); *Colonial Bank* v. *Whinney*. (3) The note in the certificate is an undertaking by the company that a transfer of the shares will not be registered without production of the certificate unless its absence is satisfactorily accounted for.

[FARWELL J. The note appears to follow the form in Palmer's Company Precedents, 8th ed. Pt. I. p. 985.]

Maynard v. *Consolidated Kent Collieries Corporation* (4) shews that where a transfer is "not in order" the directors can go behind it to ascertain the true facts. Here the directors made no inquiry of the person who held the certificate.

[FARWELL J. Do you say that the company are liable in contract, or how do you put your case?]

There is no case directly in point. The note is placed on the certificate for some purpose. It is more than a warning to the shareholder to take care of his certificate. It is an assurance by the company, upon which a lawful holder of the certificates is entitled to rely, to the effect that, according to their usual practice, the company will decline to register any transfer of shares until the relative certificates are produced, or their non-production is satisfactorily accounted for: per

(1) (1875) L. R. 7 H. L. 496, 509.
(2) (1885) 11 App. Cas. 20, 37.
(3) (1886) 11 App. Cas. 426, 441.
(4) [1903] 2 K. B. 121.

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Lord Watson in *Colonial Bank* v. *Whinney*. (1) It amounts to a contract with the lawful holder of the certificate that the company will deal with the shares in due course. Here the directors registered a transfer that was "not in order" without inquiry and without a sufficient explanation for the non-production of the certificate. That was not a reasonable exercise of their discretion under their articles, and the company are liable in damages for the loss sustained by the plaintiff.

Upjohn, K.C., and *Clauson*, for the company. Sect. 22 of the Companies Act, 1862, enacts that shares in a company are personal estate and transmissible in manner provided by the regulations of the company. That throws one back to arts. 21 to 24 of the company. Then s. 30 of the Act, which is in substance the same as art. 13 of the company, says that the company are not to have regard to any trusts. No doubt a company, as a trader, can for some purposes be affected by notice of a charge, as in *Bradford Banking Co.* v. *Briggs* (2); but that does not apply here. The 24th article gives the directors a discretion when registering a transfer, and the company is protected if in a case like this the directors, acting in good faith, accept evidence that a Court might hold to be insufficient.

[FARWELL J. If any duty was cast on the directors, they did not discharge themselves by accepting such a statement as that contained in Casmey's declaration.]

Then as to the meaning of the note on the certificate. The dictum of Lord Watson in *Colonial Bank* v. *Whinney* (1) is not consistent with that of Lord Cairns in the case of the *Shropshire Union Railways and Canal Co.* v. *Reg.* (3), on which we rely; and Lord Selborne in *Société Générale de Paris* v. *Walker* (4) refers to this dictum of Lord Cairns and does not dissent from it. The note is not a contract, nor is it a representation which operates as an estoppel against the company; it is merely a statement of the general practice of the company when called upon to register a transfer. It is a warning that the certificate is a document of importance

(1) 11 App. Cas. 441.
(2) (1886) 12 App. Cas. 29.
(3) L. R. 7 H. L. 509.
(4) 11 App. Cas. 29.

which the company may require to be produced on a transfer. It is purely gratuitous; but if it is to be held to be a contract or representation binding on the company, all companies will at once cease to put such a note on their certificates.

[*Jenkins*, K.C., as amicus curiæ, referred to *In re Goy & Co.* (1)

FARWELL J. That case is explained by Buckley J. in *In re Palmer's Decoration and Furnishing Co.* (2), and does not help me much.]

If the note is an offer of a promise, how is it an offer to the plaintiff? It does not amount to a contract within the principle of cases like *Williams* v. *Carwardine* (3); *Carlill* v. *Carbolic Smoke Ball Co.* (4); *Brogden* v. *Metropolitan Ry. Co.* (5) It is a mere declaration of intention, like an auctioneer's advertisement, as in *Harris* v. *Nickerson.* (6)

Clarkson, in reply.

Cur. adv. vult.

Dec. 20. FARWELL J. delivered the following written judgment:—In May, 1903, the plaintiff lent to one Casmey 100*l.* and took from him as security a transfer of 120 ordinary shares in the defendant company, with the date left in blank. Casmey was then the registered holder of these shares, and he handed over the certificate with the transfer to the plaintiff. On June 25, 1903, Casmey executed a transfer of the same 120 shares to one Younie in consideration of 90*l.* This transfer was presented to the company for registration, and was registered on June 25, 1903. The absence of the certificate was accounted for to the satisfaction of the board of directors by a declaration of Casmey, in which he stated that the certificate was in the possession of a friend of his, but was not held by such friend as a charge against any loan or other consideration. The chairman of the board was called, and explained that Casmey had been a trusted servant of the company for sixteen years and that they believed his statement, and on the

(1) [1900] 2 Ch. 149.
(2) [1904] 2 Ch. 743.
(3) (1833) 4 B. & Ad. 621; 38 R. R. 328.
(4) [1893] 1 Q. B. 256.
(5) (1877) 2 App. Cas. 666.
(6) (1873) L. R. 8 Q. B. 286.

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faith of it registered the transfer and issued a fresh certificate to Younie. On September 2, 1903, the plaintiff filled in the date of his transfer and presented it for registration, which was refused, and he now sues the company for damages for such refusal, founding his claim on the note set out at the foot of the certificate: "Note.—Without the production of this certificate no transfer of the shares mentioned therein can be registered." Now I have no hesitation in finding that the board of directors acted with complete bona fides and believed Casmey's explanation of the absence of the certificate, but if they did in fact owe a duty to the plaintiff to take reasonable and proper care, I hold that they did not in fact discharge it. I cannot think that they would be justified in accepting such a statement as that the certificate was in the hands of a friend, with no reason given for its non-production by such friend and no explanation of his or its whereabouts.

But the plaintiff has to establish the existence of such a duty, and, relying as he does on the note set out above, he must contend that it amounts either to a representation which the company is estopped from denying, or that it is a contract with all persons to whose hands the certificate may come. In my opinion, it is not a case of estoppel. If the note is a representation at all, it is not one of fact, but either of intention or of law. If it is either of these, no action will, of course, lie: see *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1) and *Beattie* v. *Lord Ebury*. (2) But I am relieved from considering this point, for the plaintiff neither pleaded nor alleged in his evidence that he saw the certificate before he made the loan, that he ever read the note, or that he believed or acted on it.

But it is said that it is a contract by the company, first, with the registered owner of the shares mentioned in the certificate, and, secondly, with all persons to whose hands it may come. I pass by the first branch, as the registered owner was the rogue through whose dishonesty the present difficulty has arisen. But the second raises a question of considerable importance. There is no doubt that documents may be so

(1) (1873) L. R. 6 H. L. 352, 360. (2) (1872) L. R. 7 Ch. 777.

framed as, apart from representation and estoppel, to invite persons not parties to them to act upon the faith of some statements therein, and if such persons do in fact accept such invitation a complete contract will be established. A good illustration of this will be found in the case of *In re Agra and Masterman's Bank*. (1) The bank in that case gave a letter of credit to Dickson & Co. containing the words, "parties negotiating bills under it are requested to indorse particulars on the back hereof"; and this (as Turner L.J. said) (2) rendered it plain that the letter was given by the bank with a view to its being shewn to persons who were to negotiate the bills and to make advances on the faith of the letter—that that part of the letter was in truth addressed to the persons by whom the bills were to be negotiated; and he accordingly held that there was a good equity to sustain a bill filed by any one of the persons by whom bills drawn under the letter of credit had been negotiated to compel the board to accept and pay such bills. Lord Cairns went further, and held that, on the offer in the letter being accepted and acted on, there was a valid and binding legal contract. This is, however, in each case a question of construction of the document—not every declaration of intention, even although it assumes that persons will act on it, creates a contract. Thus, in *Harris* v. *Nickerson* (3) an auctioneer's advertisement that he would sell certain furniture on certain days was held to be a mere declaration of intention, and not to amount to a contract with any one who would act on it, although the object of the advertisement was, of course, to induce people to attend the auction. In the case before me I fail to find anything in the shape of an invitation or offer on which any one is entitled to act. In my opinion, it is addressed as a warning to the registered owner of the shares, bidding him take care of his certificate because he cannot compel the company to register a transfer without its production. Such a meaning as this makes it reasonable and in accordance with the usual practice of companies; but if it is a contract by the company not to register without production of

(1) (1867) L. R. 2 Ch. 391. (2) L. R. 2 Ch. 395.
(3) L. R. 8 Q. B. 286.

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the certificate, it is inconsistent with s. 22 of the Companies Act, 1862, and art. 24 of the company's articles, inasmuch as it would fetter the discretion given by that article by compelling the production of the certificate in every case. So far as the registered owner is concerned, such a contract would be of no service to him, but would be a limitation of the generality of his power of transfer. He is not affected by anything short of a transfer executed by himself. The company for its own sake provides that it shall not be compellable to register without the certificate, for it thus gets the security that a rogue must not only forge a signature, but also steal a certificate. But still less is there any ground for supposing that it is in the company's interest to make any offer to third persons who may get the certificate. It is no doubt to the advantage of a company to make its securities assignable free from equities; and clauses with this view, often followed by words to the effect that all persons obtaining a debenture may act accordingly, have been held to amount to contracts with persons not parties to the debenture. But this reasoning has no application to the company's shares. The 30th section of the Act of 1862 and the 13th article of the company's articles are aimed at relieving the company from the burden of considering trusts. It is of no advantage to the company, but may be the reverse, to have to regard interests outside its own register, as in *Bradford Banking Co.* v. *Briggs* (1), where the company's lien was defeated by the doctrine of *Hopkinson* v. *Rolt*. (2) It would be strange to find a company deliberately and intentionally giving up its claim to disregard trusts and inviting the world to deal with the certificates of its shares independently of legal transfer, and all the more because such a course of conduct could bring no profit to the company, but might lead to very serious consequences, if such a note as I have in the present case was held to be an invitation to all the world to deal with the certificate on the footing of a contract by the company with the holder for the time being thereof not to allow a transfer to be registered without its production. In my opinion the note on this certificate has no such meaning;

(1) 12 App. Cas. 29. (2) (1861) 9 H. L. C. 514.

but if it had, I should certainly require much clearer evidence than I have in the present case before I found that the plaintiff had read and acted on such offer.

I have so far dealt with the case on general principles, and will now refer to the three cases cited as having some bearing on the subject. In *Shropshire Union Railways and Canal Co.* v. *Reg.* (1) Lord Cairns says: "It is said that there was some complete protection in the possession of the certificates, so that if the holder passed them over to another person that other person would think he obtained a good title, because no transfer could be permitted without the production of the certificates. But, my Lords, whether a transfer should be permitted or not under those circumstances would be entirely within the discretion of the directors. They were not bound to permit a transfer without the production of the certificates, but, though not bound to permit a transfer, I apprehend they would not be in any way answerable if the transfer should be in any case made without the production of the certificates of the shares." If this was the decision of the House, there would be nothing for me to decide; but I do not think that it was, and it is clear that Lord Blackburn, in *Colonial Bank* v. *Whinney* (2), did not so regard it, for he says: "But I continue to think that it is not wrong in the directors to act in the way which by this note they hold forth that they will act, and I think it at least doubtful whether, if they hastily and without inquiry registered the transfer, they might not incur responsibility to a pledgee who had the certificates with that note upon them if he suffered loss from their so acting." The decision in that case has no bearing on the present. It was there held that the shares of a registered shareholder who had deposited his certificates (with a note similar to but rather more resembling words of contract than the one in the present case on them) were not in his order and disposition on bankruptcy. The House held that a deposit of certificates would create a good equitable security, that the depositor might still continue to be the reputed owner, but that whether he did so or not was a question of fact, namely, whether the goods were in

(1) L. R. 7 H. L. 496, 509. (2) 11 App. Cas. 426, 438.

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such a situation as to convey to the minds of those who knew their situation the reputation of ownership, and that persons who gave credit to the registered holder of shares mentioned in a certificate with such a note had no legitimate ground for believing that they were such owners unless the certificates were produced. The case of *Société Générale de Paris* v. *Walker* (1) has no direct bearing on the present case, but Lord Selborne cites Lord Cairns' dictum in *Shropshire Union Railways and Canal Co.* v. *Reg.* (2) apparently with approval, and Lord Blackburn (3) certainly does not express any opinion in favour of the plaintiff. The case is, therefore, not covered by authority, but the dictum of Lord Cairns is in favour of my view. I hold, therefore, that the plaintiff's case fails, and must be dismissed with costs.

Solicitor for plaintiff: *C. G. Cudby, for S. Brown, Manchester.*

Solicitors for defendants: *Gadsden & Treherne.*

(1) 11 App. Cas. 20, 29. (2) L. R. 7 H. L. 496.
(3) 11 App. Cas. 36, 37.

H. L. F.

In re W. W. DUNCAN & CO.

BUCKLEY J.

1905

Jan. 17.

[00159 of 1901.]

Company—Winding-up—Creditor — Proof for Interest—Solvent Company—Gaming and Wagering Contract—Interest on Sums deposited as Cover.

A company carrying on the business of outside brokers had transactions with its customers which were held to be illegal gambling transactions. The customers deposited money with the company as cover for differences on these transactions, and it was held that they were entitled to prove in the winding-up of the company for the amounts remaining in the company's hands as deposits.

The liquidator, on the proofs admitted in respect of deposits, paid by cheques two dividends amounting together to 20s. in the pound, and each creditor gave him a receipt for the amount of the second dividend, describing it as "the amount payable to me in respect of the second and final dividend of 10s. in the pound on and in full discharge of my claim against this company."

After payment to the creditors of 20s. in the pound on the principal of their deposits there remained a surplus in the hands of the liquidator.

It was shewn that by the course of dealing between the company and its customers interest at 4 per cent. was paid on the deposits:—

Held, that there was an implied contract by the company to pay interest on the deposits, and that the creditors were entitled to receive out of the surplus interest from the date of the winding-up until the date of payment of the second dividend:

Held, also, that there had been no accord and satisfaction of the claim for interest.

W. W. DUNCAN & CO., LIMITED, up to the time of a winding-up order being made against it, was a company carrying on business as outside stockbrokers.

The transactions between the company and its customers took place under certain "conditions of sale" printed on the back of each of their bought or sold notes. The transactions purported to be purchases and sales of stocks for settlements to be effected at three monthly periods according to the course of business which the company carried on. Any customer could commence his account at any day of the month, and his account was adjusted up to three calendar months from that day. He bought or sold as he was minded to do, and

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thereupon a bought note or sold note, as the case might be, was handed to him.

The conditions printed on the backs of the notes were, so far as material, as follows :—

" (1.) All completions take place at the office of W. W. Duncan & Co., Limited (hereinafter referred to as 'Duncans'), but customers can arrange to take up or deliver stocks through their bankers or London agents, or to settle direct with Duncans by correspondence. The full name and address of the transferee (and if required a guarantee that the purchase-money will be paid or stock delivered) are to be furnished to Duncans seven days prior to settling day. . . ."

" (3.) Stocks sold for cash are to be paid for and delivered immediately. Stocks sold for forward delivery credit account are to be paid for and delivered on the agreed settling day, interest being charged by Duncans on the nett purchase-money at the rate of 4 per cent. per annum from the date of purchase until the date of completion or resale. This interest is payable on settlement. Whenever stocks sold by Duncans for forward delivery credit account are paid for partly or wholly in advance or by instalments, a rebate of interest at 4 per cent. per annum from date of payment to date of completion is allowed on all purchase-money so paid."

" (7.) On all transactions for forward delivery credit account Duncans may at any time require a payment on account of purchase-money, and customers, on notice to that effect being given, agree to pay to Duncans within three days (unless a longer period is previously agreed) a sum in cash sufficient to balance the account to date, including depreciations in value, and to leave a reasonable sum on account of purchase-money in Duncans' hands."

On May 22, 1901, an order was made to wind up the company, and on July 31, 1902, upon the terms of the conditions and other facts, Buckley J. held, on an application by one Clarke, a customer of the company, that the transactions between him and the company were gaming and wagering transactions; that the profits made by Clarke as the result of these transactions could not be proved for in the winding-up

of the company; and that money deposited by him with the company as cover or security could not be proved for by him in the winding-up.

Clarke appealed from this decision.

The judgment of the Court of Appeal (Collins M.R. and Romer and Cozens-Hardy L.JJ.) was delivered on March 16, 1903, when the appeal was dismissed on one point, Collins M.R. expressing the opinion that Buckley J. was perfectly right in holding that Clarke could not prove in the winding-up "for the sum due to him for profits on these gambling transactions." As regards the deposits made by Clarke with the company, it was held that they were made as security for any losses which Clarke might make on the gambling transactions, that he had never made any losses, and that the amount of the deposits could be proved for by him. On this part of the case, therefore, the decision of Buckley J. was reversed.

The creditors who proved for their debts were named in schedules prepared by the liquidator.

Sched. D related to claims admitted by the liquidator in full for money due to them, and in possession of the company by way of unexhausted cover. No interest in respect of the amounts had been claimed in the proofs when sent in.

Sched. E comprised proofs of customers admitted in part, and in several of the cases interest up to the date of the liquidation had been claimed, and had been allowed by the liquidator on the amounts of principal admitted for proof.

Sched. F related to claims by customers which were at first rejected by the liquidator, but were subsequently compromised by order of the Court and admitted for certain amounts.

The claims in all the three schedules were in respect of unexhausted cover in the hands of the company to secure gaming and wagering transactions.

In 1903 and July, 1904, the liquidator paid two dividends of 10*s.* each on the amounts claimed by the creditors; but some of them contended that if there was a surplus for the contributories after paying the creditors 20*s.* in the pound the creditors were entitled to prove for interest on the amount of their debts

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from the date of the winding-up order (May 22, 1901) up to July 4, 1904, when the second dividend was paid.

The receipts given by creditors who had received the second dividend were in the following form: "[Title of matter.] Received of William George Blakemore, liquidator in the above matter, the sum of ———, being the amount payable to me in respect of the second and final dividend of ten shillings in the £ on and in full discharge of my claim against the company."

In a correspondence between one of these creditors and the liquidator, the latter in June, 1904, told the former that no interest after winding-up was payable on the claims. Robertson replied, citing authorities to shew that interest was payable if the company turned out to be solvent. On June 29, 1904, the liquidator wrote to Robertson informing him that he was about to declare the final dividend of 10*s.* in the pound, and inclosing the notice and form of receipt, and adding, "I shall of course pay this without prejudice to the interest question, which will be hereafter decided"; and after some further correspondence he again wrote to Robertson inclosing a cheque for his second dividend, "on the distinct understanding that the question of interest is quite outside this payment."

The liquidator took out a summons in the winding-up for the direction of the Court upon the claims for interest.

A. A. Hannay was appointed to represent the contributories on the hearing of the summons; Dr. F. L. Thorne was appointed to represent the creditors whose proofs had been admitted in part or in full; and H. T. Stewart was appointed to represent the creditors whose proofs had after litigation been admitted or compromised by order of the Court.

The summons was adjourned into Court and heard by Buckley J. on January 17, 1905.

J. R. Atkin, for the liquidator, stated the facts and the questions arising upon them to the Court, and referred to 3 & 4 Will. 4, c. 42, s. 28; Companies (Winding-up) Rules, 1903, r. 100; *Warrant Finance Co.'s Case* (1); *Rhymney Ry. Co.* v. *Rhymney Iron Co.* (2)

(1) (1869) L. R. 4 Ch. 643. (2) (1890) 25 Q. B. D. 146.

Hon. Frank Russell, for the representative of the creditors in Scheds. D and E. The creditors whom I represent did not enter into any compromise as regards their claims. They do not claim under the statute 3 & 4 Will. 4, c. 42, but under the contract implied by the course of dealing between them, as customers, and the company as outside brokers.

Interest is given where there is a contract to pay it either expressed or implied from the course of dealing between the parties: Seton on Judgments, 6th ed. p. 1386. A contract to pay it will be implied where interest has continually been paid by persons on balances in their hands: *Nichol* v. *Thompson*. (1) This company contracted to pay, and did pay, interest on the balances in its hands of money deposited as cover. That is enough at any rate to establish primâ facie a contract to pay interest, and to throw on the contributories the onus of shewing that it was payable on certain conditions which have not been complied with.

Attenborough, for the representative of creditors in Sched. F. The claims of these creditors are based on contract and the course of dealing. They have been admitted at certain figures. The only defence is that there was a wagering contract, illegal under s. 18 of the Gaming Act, 1845 (8 & 9 Vict. c. 109). But the deposits—on which interest is claimed—were not illegal: *Strachan* v. *Universal Stock Exchange*. (2)

The compromise does not affect the claim. It was but a compromise of the only claim which could then be made, namely, the claim for the principal and interest up to the date of the winding-up order.

Sargant, for the representative of the contributories. As to the claims of the creditors in all three schedules, the objections are—(1.) that the debts did not carry interest; (2.) that if they did carry interest, there has been, by means of the receipt in full, accord and satisfaction in respect of them.

The company held the money deposited as cover as money had and received, and not by virtue of any contract which can be recognised, for the Court of Appeal held that the whole

(1) (1807) 1 Camp. 52, n.
(2) [1895] 2 Q. B. 329; affirmed [1896] A. C. 166.

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contract was bad as a wagering contract. The company cannot hold the principal as money had and received and be liable to pay interest on it under a contract.

[BUCKLEY J. In *Strachan* v. *Universal Stock Exchange* (1) A. L. Smith L.J. says the action is for trover or detinue, and that he thinks it is trover; Rigby L.J. says (2) that he rather leans to the view that it is redemption.]

At any rate, the claims are based on different and incompatible grounds, and the claim for interest is a claim dehors the contract.

In Robertson's particular case the point as to interest was kept open, but as against the other creditors there is the defence of accord and satisfaction.

The amounts were paid by cheque, which, even if it is the debtor's own cheque, is a good accord and satisfaction: *Goddard & Son* v. *O'Brien.* (3)

As regards the creditors in Sched. F, the compromise with them covers all their claims against the company, including any claim for future interest.

BUCKLEY J. The company in this case carried on the business of outside brokers, and received from persons who were minded to be its customers deposits of sums as cover. It then entered into transactions for those customers which have been held to be wagering and gaming transactions, and therefore illegal. As a result of the course of dealing between the company and its customers, I think it is fully made out that the contract between the company and its customers was that interest should be allowed upon the amounts which were deposited by the customers by way of cover. In the winding-up the claims of the customers have been admitted for certain amounts, and the particular cases with which I have to deal are those which are contained in Scheds. D, E, and F, in an exhibit to an affidavit made by the liquidator. For the purposes of this judgment I do not think there is, in point of principle, any difference between the three classes of cases with

(1) [1895] 2 Q. B. 333. (2) [1895] 2 Q. B. 335.
(3) (1882) 9 Q. B. D. 37.

which I have to deal, although Mr. Sargant has pressed one point with regard to class F which I will deal with separately. I think it is made out that there was, by reason of the course of dealing between the parties, a contract that the company would pay interest to the customer on the amount of his cover. Happily, the result of the winding-up is that there has been enough to pay the creditors 20*s.* in the pound, and the only question I have to determine is whether the customers are, in addition, entitled to interest from the date of the winding-up until the date of payment of the principal sums due to them. In my opinion they are. In *Strachan* v. *Universal Stock Exchange* (1), which went to the House of Lords, and is reported as *Universal Stock Exchange* v. *Strachan* in [1896] A. C. 166, it was held, in an action to recover securities deposited as cover for differences which might arise on gambling transactions in stocks and shares, that the Gaming Act, 1845, applies only to money or valuable things deposited as the stake to abide the event of a wager, and does not apply to money and valuable things deposited as security for the observance by the loser of the terms of the wagering contract. Rigby L.J., at p. 335 of the report in the *Law Reports*, [1895] 2 Q. B., says this: "The claim"—that is, to get back the valuables—"may be called a claim in trover or detinue, or it may be called, and I rather lean to that point of view myself, redemption. Here is a man who claims to be a mortgagee"—that is to say, this company is here claiming to hold these deposited moneys as a mortgagee. "Directly the transactions are held to be gaming transactions, it follows as a matter of course that his claim in respect of them fails"—that is to say, there is no mortgage debt—"and where from the nature of the transaction itself nothing can be due on the mortgage, the mortgagee must deliver up the security." It is quite plain that the Lord Justice is dealing with the claim as a claim made in contract. It is a contract between the parties for security under such circumstances that there is no mortgage debt in respect of which the mortgagee can hold the securities. Here the proof and the

(1) [1895] 2 Q. B. 329.

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subsequent claim for interest in the winding-up are the form in which, under the circumstances, the customer asserts his right to work out the obligations arising under the contract, including, as it seems to me, his right in respect of interest. I think, therefore, the company turning out to be a solvent company, that the depositors are entitled to the interest, which, as part of the course of dealing, was payable by the company to them in respect of their cover.

But then it is said that, even supposing that is so, the creditors have released the claim to interest because each creditor has signed a receipt in which he takes a sum representing a second and final dividend of 10*s.* in the pound, "being the amount payable to me in respect of the second and final dividend in full discharge of my claim against this company." It is contended that that was a release of the right to interest if it existed.

Now one of these gentlemen, a Mr. Robertson, was asked to sign that, and there is exhibited to one of the affidavits a bundle of correspondence which shews this to be absolutely plain—that before the liquidator was going to pay this dividend he knew there was this question in respect of interest, and that as regards Robertson he appended his signature to that form of receipt on the terms that the question of interest should be left entirely open. Those terms were accepted by the liquidator; but I am asked by counsel for the contributories to say that, notwithstanding that arrangement, the liquidator intended, by taking this form of receipt, to entrap every other creditor in the concern and get a release from him, when he knew all the time that there was really a question to be determined whether these creditors were entitled to interest or not. I decline to attribute such an intention to any liquidator; it would be a most dishonest thing to do. It is the liquidator's duty to see that the estate in his hands is distributed according to the rights of the parties, not to induce somebody to give away by a slip a right as to which the liquidator knows there is a real question to be determined. I do not think that the receipts of any of the creditors were taken or given with the

intention of precluding this question. Over and beyond that, any creditor who signed a receipt in that form got no consideration at all for giving up his right to interest if he had any. He was entitled to receive the second dividend, 10*s.* in the pound. It was what he was then known to be entitled to as his share on the distribution of assets in the winding-up of the company, and in respect of that receipt he received no consideration whatever for the release of his right to any further sum, if there was any, that was payable. I do not think there is any doubt that the right to interest was left open.

That disposes of the case as regards classes D and E. With regard to class F, this further point is made on behalf of the contributories. The people of that class sent in their proofs. The liquidator rejected their proofs altogether. That matter was then brought before the Court, the decision of the liquidator rejecting the proofs was reversed, and the proofs were admitted to rank for dividend in the winding-up of the company for various amounts. Now what do you admit to proof for dividend in the winding-up of a company? The amount of the debt at the commencement of the winding-up. That has nothing whatever to do with the payment of interest accruing due after the winding-up if the company turns out to be solvent. There could not until the fact of solvency was ascertained be a right to claim that interest. The sum for which proof can be made is the amount which is entitled to rank for dividend against the assets to such an extent as they will go.

A compromise in respect of that right of proof is no compromise of the right to have interest if the company turns out, as it has in this case, to be solvent.

I think, therefore, the liquidator ought to pay to the creditors of the classes D, E, and F, out of the surplus assets of the company, after paying 20*s.* in the pound, interest according to the rate which prevailed during the course of dealings between the company and the customers—in every case on the amount which has been admitted to proof in respect, not of winnings, but of sums deposited as cover.

The costs of all parties must be paid out of the assets, and,

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as representation orders have been made, the costs will be as between solicitor and client.

Solicitors for liquidator: *Tyrrell Lewis, Lewis & Broadbent.*

Solicitors for representatives of creditors in classes D and E: *Emmet & Co.*

Solicitors for representative of creditors in class F: *Attenborough & Son.*

Solicitor for contributories' representative: *Nathaniel Reynolds.*

F. E.

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[1904 G. 2124.]

Vendor and Purchaser—Conveyance—Implied Covenants for Title—Breach—Damages—Defect of Title appearing on Conveyance—Undisclosed Easement—Repayment of Costs of Litigation—Solicitor and Client Costs—Indemnity — Interest — Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 7.

The defendant conveyed part of a building estate in fee simple as beneficial owner to the plaintiffs. The plaintiffs had notice both on the face of and outside the conveyance that previous purchasers of parts of the estate had rights of way over a road. As between the plaintiffs and the defendant, however, the former were to take the land discharged from those rights. The conveyance contained no express covenants for title nor any qualification of the implied covenants. The plaintiffs entered on the land and blocked up the road; and a previous purchaser claimed 5000*l.* damages from them for doing so. The plaintiffs gave notice to the defendant and, under protest, went to arbitration. An award was made giving the previous purchaser 510*l.* The plaintiffs still disputed his right, and he brought an action in which, on a special case, the plaintiffs were held liable to pay him the 510*l.* and interest, and the costs of the arbitration proceedings and of the action. They paid these sums, and brought this action claiming from the defendant repayment of the money thus paid and of their own costs of the arbitration and action:—

Held, following *Turner* v. *Moon*, [1901] 2 Ch. 825, that the plaintiffs were entitled to bring an action for damages under the defendant's implied covenants for title; that their knowledge of the previous purchaser's rights did not prevent them from making this claim; that the defendant was liable to indemnify them, and must repay the 510*l.* and interest and the costs which they had paid to the previous purchaser; and must also

pay to them subsequent interest on the 510*l.* and their costs of the arbitration proceedings as between solicitor and client; but that he need not pay their costs of the special case.

THIS was an action for damages for breach of implied covenants for title by the defendant contained in an indenture of August 13, 1900. That deed was made between the defendant of the one part and the plaintiffs of the other part, and by it the defendant, in consideration of 11,000*l.* paid by the plaintiffs, conveyed to them certain land forming part of a building estate called the Drayton Park estate, owned by the defendant, and adjoining the Great Western Railway at Hanwell. The purchase included part of the site of a proposed road called Tennyson Road. By the conveyance the defendant was expressed to convey in fee simple as beneficial owner. The conveyance contained no express covenants for title nor any qualification of implied covenants. The plaintiffs proceeded to construct works on the land, and in so doing blocked up Tennyson Road. Before the date of the conveyance to the plaintiffs other persons, including a Mr. Johnstone, had purchased lots forming part of the building estate; and in 1902 Mr. Johnstone required the plaintiffs to pay him 5000*l.* as compensation for stopping up his right of way over Tennyson Road, and in case of dispute to have the amount settled by arbitration. The plaintiffs, under protest, appointed an arbitrator, and gave notice to the defendant that he would have to repay to them any sum awarded against them and their expenses of resisting the claim. He repudiated all liability, but assisted the plaintiffs at the arbitration, and was present thereat by counsel although he took no part in it. An award was made fixing the amount of compensation at 510*l.* The plaintiffs did not pay the 510*l.*, but disputed Mr. Johnstone's right to any compensation; and he accordingly brought an action against them to enforce the award. The plaintiffs served a third-party notice on the defendant, but it was discharged on his application. The action came on as a special case in the King's Bench Division, when Bigham J. decided in favour of Mr. Johnstone, and ordered the plaintiffs to pay him the 510*l.* with interest at 4 per cent., the costs of the

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arbitration proceedings, and the costs of the action. The plaintiffs under this judgment paid 510*l.* and 21*l.* 1*s.* 10*d.* interest, and 293*l.* 15*s.* for Mr. Johnstone's costs of the arbitration and award and action. In the present action the plaintiffs claimed as damages under the defendant's implied covenants for title to be repaid by Mr. Fisher—(1.) the 510*l.* with interest at 4 per cent.; (2.) 293*l.* 15*s.*, being Mr. Johnstone's taxed costs of the arbitration proceedings and award and of the action in the King's Bench Division; (3.) the plaintiffs' costs of the arbitration proceedings and award and of the action, to be taxed as between solicitor and client, on the ground that by his implied covenant in the conveyance he had agreed to indemnify them.

The defendant repudiated the claim, and said that the plaintiffs had full notice of Mr. Johnstone's rights, or would have discovered them if they had made reasonable inquiries.

Cripps, K.C., and *Howard Wright*, for the company. The defendant is liable to indemnify us for all the expense to which we have been put. He sold the property to us without any reservation, and with the intention that we should block up Tennyson Road.

By his conveyance to us he purported to convey as beneficial owner. That implies, under s. 7, sub-s. 1 (*a*), of the Conveyancing Act, 1881, a covenant for freedom from incumbrances. Under that covenant we are entitled to be indemnified by him for the sums we have paid: *Turner* v. *Moon*. (1)

Our losses have been caused by defects in the defendant's title. The vendor is liable under the covenant even if the defects in title appear on the face of the conveyance: *Page* v. *Midland Ry. Co.* (2)

The measure of the damages we are entitled to recover is the amount of costs, damages, and expenses we have had to pay: *Rolph* v. *Crouch*. (3) Our costs of defending the arbitration and the special case must be repaid as between solicitor and client: *Smith* v. *Compton*. (4) We are not indemnified unless we receive the full amount of those costs.

(1) [1901] 2 Ch. 825.
(2) [1894] 1 Ch. 11.
(3) (1867) L. R. 3 Ex. 44.
(4) (1832) 3 B. & Ad. 407; 37 R. R. 387.

[BUCKLEY J. referred to *Barnett* v. *Eccles Corporation*. (1)]

We admit that in compensation cases solicitor and client costs are not recoverable unless expressly provided for; but we claim under a contract of indemnity.

Buckmaster, K.C., and *W. Mackenzie*, for the defendant. The company knew when they bought the land that part of the building estate had been already sold, and that Tennyson Road was to be constructed and run right through the estate. That was sufficient to put them on inquiry. The conveyance shewed that they were to have a right to use that road jointly with other people. They cannot say that we have agreed to indemnify them against the rights of the other purchasers. If a vendor sells as beneficial owner without mentioning an easement which affects the land, the purchaser takes subject to that easement if he has had sufficient notice of its existence to put him upon inquiry before the sale. A sale of the fee simple by a vendor as beneficial owner gives the purchaser no right against him on his implied covenant for title in respect of undisclosed easements which the purchaser could have found out by inquiry, and of which he had sufficient notice to put him on inquiry. If a purchaser knows of a defect and is too careless to inquire he has no remedy: *Bowles* v. *Round*. (2) There are no special circumstances to take this case out of that rule. Therefore the plaintiffs are not entitled to recover anything under the implied covenant for title.

At all events, they cannot recover the costs which they have had to pay: *Page* v. *Midland Ry. Co.* (3) That case was cited against us on the first point, but it turned, not upon an undisclosed easement, but on a defect of title which would have entitled the purchaser to escape from the bargain at any time.

Even if the plaintiffs can recover the 510*l.* they cannot recover the costs of the special case: *Baxendale* v. *London, Chatham and Dover Ry. Co.* (4) They knew all the facts, and ought to have paid the amount of the award at once. They cannot recover any costs as between solicitor and client. They ought to have paid into court in the arbitration or made a

(1) [1900] 2 Q. B. 104, 423.
(2) (1800) 5 Ves. 508; 5 R. R. 107.
(3) [1894] 1 Ch. 11, 21.
(4) (1874) L. R. 10 Ex. 35.

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tender of the right amount. Then Mr. Johnstone would have had to pay the costs: *Barnett* v. *Eccles Corporation.* (1)

Cripps, K.C., in reply. If we had not contested the arbitration proceedings we should have had to pay the whole 5000*l.* claimed by Mr. Johnstone. Those costs were incurred reasonably and in consequence of the breach of covenant, and with full notice to Mr. Fisher, and he ought to repay them: *Sutton* v. *Baillie.* (2)

Cur. adv. vult.

Dec. 21. BUCKLEY J. read a judgment in which he reviewed the evidence at length, and said that at the date of the conveyance to them the company knew that Tennyson Road was to be constructed throughout its length, and that possibly or probably previous purchasers of lots on the estate would be entitled to rights over it. They derived this information from the plans deposited with the district council, and from the grant to them in the conveyance of a right of way over so much of Tennyson Road as was shewn on the plan upon the conveyance "in common with all other persons entitled to use the same." As between Mr. Fisher and the company, however, the bargain was that they were to take the land discharged from those rights of previous purchasers, and that Tennyson Road was not to be completed. [His Lordship continued:—]

Having regard to those facts, it is in my opinion plain that as between the defendant as vendor and the plaintiffs as purchasers the bargain was that so much of Tennyson Road as lay upon the plaintiffs' land should be abandoned; and if any rights of third parties were thus interfered with, it would result that it was for the defendant to make good to the plaintiffs any diminution in value of the property which as between them was the subject of the agreement and conveyance.

What afterwards happened was this. On July 28, 1902, Johnstone claimed compensation for loss of that part of Tennyson Road which the plaintiffs had blocked up and destroyed by the construction of sidings upon the land, and named 5000*l.* as

(1) [1900] 2 Q. B. 104, 423. (2) (1891) 65 L. T. 528.

the amount of his claim. The railway company appointed an arbitrator under protest and the matter was fought out, with the result that on June 25, 1903, Mr. Watney made his award of 510*l*. Upon the arbitration the defendant appeared, I understand, by counsel, but took no actual part in the arbitration. There are, however, letters of May 15, 1903, onwards, and in particular one of May 22, 1903, which shew that the defendant was working with the plaintiffs in the conduct of the arbitration. After the award was made the plaintiffs did not—as it seems to me they ought to have done—pay the amount awarded and seek to recover against the defendant their damages up to that time; but they allowed an action to be brought upon the award, and defended the action with a view to raising the question whether Johnstone was entitled to any compensation or not—whether, in short, he was entitled to a right of way over so much of Tennyson Road as the Great Western Railway Company had blocked and destroyed. In the result a special case was stated, upon which Bigham J. found against the Great Western Railway Company, determining, in fact, that Johnstone had a right of way over the whole of Tennyson Road. That decision is not one for me to review; but counsel for the defendant Fisher, who was not a party to the special case and is not bound by that decision, has intimated that he reserves his right to contest it in the Court of Appeal should the present case go there.

The plaintiffs say that they are entitled to damages against the defendant, and that the damages are, first, 510*l*.; secondly, the costs they have had to pay in the arbitration and in the action; and, thirdly, their own costs as between solicitor and client in the arbitration and action. I have to decide whether in this they are right.

It was decided by Joyce J. in *Turner* v. *Moon* (1) that in an action for damages for breach of the covenant for title implied by s. 7 of the Conveyancing Act, 1881, which is this case, damages may be recovered for defect of title by reason of the existence of an undisclosed right of way. Upon the point there decided I simply follow, without expressing any opinion

(1) [1901] 2 Ch. 825.

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of my own, the decision of my brother Joyce. The defendant argues, however, that the plaintiffs here are not entitled to damages because they knew of the rights subsisting between Johnstone and Fisher. I think they did know; but I also think that, for the reasons which I have stated, Fisher's conveyance was, as between himself and the plaintiffs, a conveyance of the land discharged from those rights. It was decided in *Levett* v. *Withrington* (1) that mere notice to a purchaser of a defect in title does not bar his right to recover; and in *Page* v. *Midland Ry. Co.* (2) it was further decided that no difference is to be made by reason of the fact that the defect of title appears upon the face of the conveyance. "There is no warrant," said Lindley L.J., "for qualifying the acts covenanted against by inserting 'save as herein appears,' or 'save as shewn by the abstract,' or 'save as explained before the execution of this deed,' or any words to any such effect. If a vendor does not intend that his covenant for title shall extend to defects disclosed to the purchaser, whether on the face of the deed, or aliunde, the vendor must take care not to word his covenant so as in terms to cover such defects, or he must insert some clause in the deed clearly explaining and controlling his covenant." The knowledge which the purchasers here obtained by seeing the estate plan and knowing of the previous sales of plots upon the footing of that plan was notice outside the conveyance. The statement that the plan had been deposited with the Hanwell District Council, and that other persons were entitled to use some portion at least of Tennyson Road, was notice on the face of the conveyance, but neither the one nor the other justifies the insertion into the conveyance of words qualifying the covenant in respect of the acts covenanted against. There was in this conveyance no express covenant which required qualification, but there was an implied covenant introduced by virtue of s. 7 of the Conveyancing Act, 1881; and, having regard to the decision in *Turner* v. *Moon* (3), this implied covenant, unless qualified, gives rise to a right to damages. I have no doubt myself but

(1) (1687) 1 Lutw. 317. (2) [1894] 1 Ch. 11, 20.
(3) [1901] 2 Ch. 825.

that the defendant knew that the company contemplated the use, and intended that the company should use, the purchased land in such a manner as that Tennyson Road, so far as it lay on that land, should never be constructed. I think that the defendant is liable in damages.

Then what is the measure of damages? It is in the first place the 510*l.* which the plaintiffs have been compelled to pay in order to enjoy the land in the actual state in which by the contract they were to enjoy it. To this is to be added, I think, the costs to which they were necessarily put in determining in the arbitration that 510*l.* was the proper figure. Johnstone had claimed 5000*l.* Under s. 68 of the Act of 1845 the company were bound either to admit that to be the figure or to proceed to arbitration. They did the latter, with the result that 510*l.* was the amount awarded, and there was necessarily incurred in ascertaining that sum taxed costs as between party and party which they had to pay to Johnstone, and the company's costs of the arbitration proceedings. They are, I think, entitled to recover all those as damages: *Rolph* v. *Crouch*. (1) Then, subsequently, the Great Western defended the action on the award. They cannot, in my opinion, claim as damages any of the costs which they either had to pay or which they incurred in that proceeding. They knew the facts, from which they ought to have been aware that the rights were such as Bigham J. subsequently decided them to be, and they ought not to have put Mr. Johnstone to bring the action. Those costs are not legal damages as between them and Fisher. I think, however, that the plaintiffs are entitled to recover the 510*l.* and the taxed costs which they have had to pay in the arbitration proceedings and their own costs in the arbitration, and I give judgment for the damages thus ascertained, with the costs of the action.

[Some discussion followed as to whether the plaintiffs' own costs in the arbitration should be taxed as between solicitor and client or between party and party. At its close his Lordship said:—]

The plaintiffs' costs of the arbitration proceedings must be

(1) L. R. 3 Ex. 44.

BUCKLEY J. 1904 GREAT WESTERN RAILWAY v. FISHER.

paid as between solicitor and client. As between Fisher and the Great Western Railway Company, the Great Western Railway Company are entitled to say, "We were put to certain costs in respect of which we can claim damages against you." Those costs are such costs—proper costs, of course—as they incurred. The proper costs under these circumstances are those which they incurred as between themselves and their own solicitor—that is to say, they are solicitor and client costs. The matter must be treated as if Fisher, and not the Great Western Railway Company, had been the person opposing Johnstone, in which case, of course, he would have had to pay his own solicitor. I think, therefore, that those costs—that is to say, the Great Western Railway Company's costs of the arbitration—are to be taxed as between solicitor and client.

Barnett v. *Eccles Corporation* (1) was a case in which the person claiming solicitor and client costs was in the proceeding a litigant adverse to the person from whom he was claiming them. He had recovered party and party costs, and the Court said, "You can have no more. Party and party costs are that which the Court allows, and you can only have those." The present case is distinguishable because here the Great Western Railway Company and Fisher were not the adverse litigants in the proceedings in which the costs were incurred: the adverse litigants were the Great Western Railway Company and Johnstone. It is upon this ground and not upon any application of *Smith* v. *Compton* (2) that I decide the point. I agree in thinking that a distinction is to be drawn between cases in which a person is entitled by contract to an indemnity and cases in which a person is simply recovering damages. If a person is entitled to an indemnity, there may be a right to solicitor and client costs; but where he is simply recovering damages he would not in general get solicitor and client costs. *Smith* v. *Compton* (2), which is an authority to the contrary effect, would not, I think, now be followed, having regard to *Barnett* v. *Eccles Corporation*. (1) The reasoning, however, in *Barnett* v. *Eccles Corporation* (1) does not apply to this case. Fisher was not an adverse litigant in the proceedings in which the costs were incurred. There is no question of party

(1) [1900] 2 Q. B. 104, 423. (2) 3 B. & Ad. 407; 37 R. R. 387.

and party costs as between the Great Western Railway Company and Fisher. The question is what costs Fisher ought to bear by reason of the fact that his act involved the Great Western Railway in a litigation with Johnstone. I think he ought to bear that which the Great Western Railway necessarily bore—that is to say, their proper costs as between solicitor and client.

1905. Jan. 18. *Howard Wright*, for the plaintiffs, asked for a direction that the defendant should repay to them the interest which they had paid to Mr. Johnstone on the 510*l.*, and also pay interest thereon at 4 per cent. from the date of that payment. It had not been observed at the time when judgment was pronounced that the Court had not dealt with this point.

W. Mackenzie, for the defendant. Interest is not payable on damages.

[BUCKLEY J. But interest may be taken into consideration in computing damages.]

If the plaintiffs had paid the 510*l.* to Mr. Johnstone at the date of the award no interest would have accrued. The announcement in the statement of claim that interest will be asked for is not a sufficient demand within the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28: *Rhymney Ry. Co.* v. *Rhymney Iron Co.* (1)

BUCKLEY J. I think the plaintiffs are entitled to be repaid the interest which they have paid, and to be paid subsequent interest at 4 per cent. Under the implied covenant on which in substance the plaintiffs were suing they were entitled to recover such damages as they had sustained. In my judgment I spoke of the 510*l.*, but I did not mean by that to exclude interest. Both parties are in the wrong on this application: the plaintiffs because they ought to have made it at the hearing, and the defendant because he has unsuccessfully resisted it; so there will be no costs of to-day.

Solicitors: *R. R. Nelson; Mills, Curry & Gaskell.*

(1) (1890) 25 Q. B. D. 146.

H. C. R.

Considered and criticised. LEAF *v.* INTERNATIONAL GALLERIES. [1950] 1 All E.R. 693.

Disapproved. SOLLE *v.* BUTCHER [1950] 1 K. B. 674

Considered. LEAF *v* INTERNATIONAL GALLERIES [1950] 2 K. B 86

JOYCE J.

1904

Dec. 2, 3, 5, 6, 7, 8.

SEDDON *v.* THE NORTH EASTERN SALT COMPANY, LIMITED.

[1904 S. 248.]

Contract—Executed Contract—Rescission—Misrepresentation—Absence of Fraud—Delay.

The Court will not grant rescission of an executed contract for the sale of a chattel or chose in action on the ground of an innocent misrepresentation.

In order for the plaintiff to succeed in such a case fraud must be proved. *Wilde* v. *Gibson*, (1848) 1 H. L. C. 605, 632; 73 R. R. 191, 209, *Brownlie* v. *Campbell*, (1880) 5 App. Cas. 925, and *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.*, (1867) L. R. 2 Q. B. 580, applied.

TRIAL OF ACTION.

This was an action by the plaintiff Seddon and the London Salt Company claiming a declaration that certain contracts for the purchase by Seddon of all the shares in the company were not binding on him and ought to be rescinded, and that he was entitled to be repaid the sums paid by him for the said shares, or to be paid compensation for the loss he had suffered by having acquired them. The plaintiffs further claimed an injunction against the defendants to restrain them from selling their salt in the London market to persons who were customers of the London Salt Company prior to the date of the plaintiff Seddon's purchase.

The plaintiff Seddon was a salt merchant and manufacturer carrying on business at Middlewich in Cheshire and in London.

The London Salt Company was incorporated on February 11, 1903, to purchase and carry on a salt-selling business. The business had previously been carried on by a firm which became bankrupt in 1902. The trustee in bankruptcy sold it for 3250*l.* to one Watson. Watson sold a third share to the defendant Hewett, and in November, 1902, Watson and Hewett resold the business to the company. The capital of the company was 5000*l.* in 5000 shares of 1*l.* each. The com-

pany traded in London, and part of its business was to sell in the London market salt consigned to it by the defendants the North Eastern Salt Company, the Cleveland Salt Company, the Tees Salt Company, Sir Christopher Furness, the Owners of the Middlesborough Estate, Limited, and the Salt Union, Limited. The whole of the shares in the North Eastern Salt Company were held by the other defendant firms, and the whole of the shares in the London Salt Company were at the time of the plaintiff's purchase held by or under control of all the defendant firms (except the Salt Union, Limited) and of the defendant George Hewett, who was its managing director and held 1680 of its shares.

The defendants (other than the Salt Union, Limited) carried on the business at a net loss until September 30, 1903, when the plaintiff came into contact with the defendant Hewett, who proposed to sell his interest in the company for the par face value (namely, 17*s.* 6*d.*) of the shares with a bonus of 200*l.*, he agreeing to resign his post of managing director. Negotiations were also conducted by one Storr on behalf of the other defendants (except the Salt Union, Limited), who were joined as defendants because they were shareholders in the North Eastern Salt Company, and were trading in competition in London. Storr was a director of the Cleveland Salt Company and of the North Eastern Salt Company, and also chairman of the London Salt Company.

The plaintiff alleged that during the course of the negotiations the defendant Hewett represented to him, when Storr was present but silent, that up to September 30, 1903, the London Salt Company had made a net trading loss not exceeding 200*l.*, or at the outside 250*l.*; and that on the faith of such representation he ultimately purchased the whole of the shares at the price of 4575*l.* In a letter dated October 8, 1903, and addressed by the plaintiff to Storr and accepted by him, the plaintiff undertook, in consideration of the sale, to take from the North Eastern Salt Company all the coarse or common salt required by the London Salt Company for a period of seven years, and it was agreed that in the event of the North Eastern Salt Company ceasing to exist the guarantee

JOYCE J. 1904 SEDDON v. NORTH EASTERN SALT COMPANY, LIMITED.

was to be a continuing one to the defendants the Tees Salt Company, the Cleveland Salt Company, the Owners of the Middlesborough Estate, Limited, and Sir Christopher Furness. On October 9, 1903, the plaintiff took over the business of the company, and commenced to carry it on, all the shares having been previously transferred to him. He at once discovered, as he alleged, from the books which were put under his control that the losses must have been larger than 250*l.*, and on October 12 he wrote to Storr as follows: "I have spent some little time in endeavouring to ascertain the position, and must say that whilst I was prepared for something pretty startling, the position disclosed by the books exceeds all anticipation. Mr. Hewett in your presence said he estimated at the outside 250*l.* As a matter of fact the period ending September 30 will more probably shew a loss of anything between one and two thousand." An audit of the company's affairs was being prepared meanwhile by a firm of accountants who had acted as auditors in the defendants' time, and their audited balance-sheet and profit and loss account made up to September 30, 1903, was sent in on December 18, 1903, from which it appeared that a loss of over 900*l.* was shewn. The plaintiff also became aware that considerable debts were due from the company, including 1000*l.* due to the North Eastern Salt Company; and he alleged that in order to meet these claims he was obliged to make and pay a call of the remaining 2*s.* 6*d.* due on each of the shares.

The plaintiff, however, carried on the business at a net profit down to January 20, 1904, when he issued the writ in this action claiming the declaration and injunction above referred to.

Gore-Browne, K.C., and *Muir Mackenzie*, for the plaintiffs. We ask for rescission of the contract and return of the purchase-money, together with 2*s.* 6*d.* per share, on the ground of misrepresentation. The misrepresentation consisted partly of the non-disclosure of facts relating to the purchase of the bankrupt stock, the disclosure of which would have qualified the statement as to losses that was in fact made. We do not

allege fraud; but a misrepresentation of this kind, even if wholly innocent, entitles the plaintiff to succeed. Here a restitutio in integrum is possible.

[JOYCE J. Can I rescind the contract after it has been performed?]

A completed contract can be set aside, e.g., in the case of a contract of partnership or insurance.

[JOYCE J. In the absence of fraud? *Wilde* v. *Gibson* (1) and *Brownlie* v. *Campbell* (2) are against you.]

If rescission cannot be decreed, we ask for the injunction. The defendants sold the whole of the shares to the plaintiff with the expressed intention to pass the goodwill of the business. They cannot now deal with the customers of the company in competition with the business.

Younger, *K.C.*, and *A. M. Talbot*, for the North Eastern Salt Company. No representation is alleged to have been made by or on behalf of these defendants, and the plaintiff is not entitled to any relief against them.

Montague Lush, *K.C.*, and *Sargant*, for the Cleveland Salt Company, Limited, the Tees Salt Company, Limited, Sir Christopher Furness, and the Owners of the Middlesborough Estate, Limited. There is no case against these defendants. The plaintiff knew that Storr was not acting as agent for Sir Christopher Furness. As against the other defendants for whom we appear, it is said that Storr, by his silence, was bound by the representation alleged to have been made by Hewett. Silence may sometimes be evidence of fraud, but no fraud is alleged here, and no case can be found in which an innocent misrepresentation has been inferred from silence. Mere silence, in the absence of fraud, is no ground for a claim of rescission. In *Brownlie* v. *Campbell* (3) there was an imputation of fraud. No doubt you may deceive a person by saying nothing when your silence indicates that you mean something, but that is not this case: see also *Smith* v. *Hughes*. (4)

(1) 1 H. L. C. 605; 73 R. R. 191.
(2) 5 App. Cas. 925.
(3) 5 App. Cas. 925, 937.
(4) (1871) L. R. 6 Q. B. 597.

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[JOYCE J. In *Walters* v. *Morgan* (1) it was said by Lord Campbell that a nod, a wink, or even a smile may do.]

Again, the plaintiff ought to have disclaimed the contract at the earliest possible moment, whereas he adopted it and proceeded to act on it in every way. He elected to keep the shares and sue for compensation. He cannot recede from that position: *Scarf* v. *Jardine* (2); *Clough* v. *London and North Western Ry. Co.* (3) Further, there can be no rescission after actual conveyance. The Court may relieve a plaintiff, where misrepresentation is proved, from further compliance with his contract where something still remains to be done; but not where the contract is wholly executed. Here it was as much executed as a conveyance of land. It was in no sense executory. On the evidence, moreover, no misrepresentation is proved. The plaintiff knew of the weekly balance-sheets even if he had not seen them.

W. F. Hamilton, K.C., and *T. A. Nash*, for the defendant Hewett. The plaintiff waited for a considerable period after he learned the actual extent of the losses before bringing his action. The contract ought to have been repudiated by him at once: *Sharpley* v. *Louth and East Coast Ry. Co.* (4) The rule as to the effect of innocent misrepresentation where the contract is executed was laid down in *Brownlie* v. *Campbell.* (5) That rule was applied by Cotton L.J. in *Soper* v. *Arnold.* (6) There can be no rescission unless the parties can be restored to their original position. That is impossible here, because Hewett cannot be put back in his position of managing director.

Gore-Browne, K.C., in reply. The law as to the necessity for immediately repudiating a contract and doing nothing in the nature of affirmation if rescission is afterwards going to be asked for has been materially altered by the House of Lords in *Mutual Reserve Life Insurance Co.* v. *Foster.* (7) There the

(1) (1861) 3 D. F. & J. 718, 724.
(2) (1889) 7 App. Cas. 345.
(3) (1871) L. R. 7 Ex. 26.
(4) (1876) 2 Ch. D. 663.
(5) 5 App. Cas. 925.
(6) (1887) 37 Ch. D. 96.
(7) (1904) 20 Times L. R. 715.

assured went on paying his premiums for two years, nevertheless rescission was granted. There is no authority to shew that a chattel or a chose in action cannot be ordered to be retransferred where there has been a misrepresentation of fact, even though an innocent one. It is said there can be no rescission because the contract is wholly executed; but that does not conclude the question. The Court will, if necessary, put the parties back in their original position though no fraud is alleged or proved: *Attorney-General* v. *Ray*. (1) That was the case of a grant of an annuity under an innocent misrepresentation of fact. Then there are the cases with regard to contracts of partnership: *Adams* v. *Newbigging* (2) and *Rawlins* v. *Wickham* (3); which shew that there can be rescission of an executed contract. In all the cases as to real property the principle of caveat emptor is seen to be applied. But that doctrine does not apply to such a case as this: see also the dicta of Lindley M.R. in *Lagunas Nitrate Co.* v. *Lagunas Syndicate*. (4) This is not the case of a contract to take shares from a company. If it were, the plaintiff must have acted promptly in order to obtain relief, because there would be the possibility of the rights of other parties intervening. After the plaintiff took possession he was bound to carry on the business, or there could have been no restitutio in integrum. As to the misrepresentation which we allege, if there was no actual untrue statement there was certainly suppressio veri within the meaning of *Oakes* v. *Turquand*. (5)

JOYCE J. The litigation in this case arises out of an arrangement for the acquisition by the plaintiff, Mr. Seddon, of the property of the London Salt Company, by the purchase of the shares of that company from the persons who really owned those shares. The claim made by the statement of claim is of a twofold nature. In the first place it asks for a rescission of the arrangement and for restitution on the ground of misrepresentation. The second part of the claim put

(1) (1874) L. R. 9 Ch. 397.
(2) (1888) 13 App. Cas. 308.
(3) (1858) 3 De G. & J. 304.
(4) [1899] 2 Ch. 392, 422.
(5) (1867) L. R. 2 H. L. 325.

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forward is for an injunction to restrain the defendants from selling on the London market, to persons who were customers of the London Salt Company prior to the said date, salt made or consigned by the salt manufacturing concerns. On the latter part of the case it is a little difficult to say on what theory it is founded, but certainly no evidence has been adduced before me in support of it.

Then, as to the claim founded on alleged misrepresentation, it appears to me, as it has done all through, that the plaintiff's way to succeeding in his claim is beset with difficulties. Now, in the first place, there is no allegation of fraud, and, in point of fact, the imputation of fraud upon the defendants has been expressly disclaimed, and properly so. Well, then, it is a claim to rescind or set aside for an innocent misrepresentation a contract for the sale of property, not executory, but executed, and under which nothing whatever still remains to be done. Lord Campbell states the rule on the question. In *Wilde* v. *Gibson* (1) he says: "My Lords, after the very attentive and anxious consideration which this case has received, I have come to the clear conclusion that the decree appealed against ought to be reversed; and I must say that in the Court below the distinction between a bill for carrying into execution an executory contract, and a bill to set aside a conveyance that has been executed, has not been very distinctly borne in mind. With regard to the first: If there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a Court of Equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a Court of Equity will set aside the conveyance only on the ground of actual fraud." Lord Selborne in *Brownlie* v. *Campbell* (2), to which I have been referred, says, after explaining the circumstances of that particular case: "The contract is ultimately entered into upon those terms. Passing from the stage of correspondence and negotiation to the stage of written agreement, the purchaser takes upon himself the risk of errors. I assumed them to be errors unconnected with fraud in the particulars, and when the

(1) 1 H. L. C. 632. (2) 5 App. Cas. 936.

conveyance takes place it is not, as far as I know, in either country"—that means in Scotland or England—"the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud." Now I do not entertain the slightest doubt about that being a correct statement of the law. It has been acted upon by Cotton L.J. in *Soper* v. *Arnold*. (1) But the rule is not only a rule of equity, it is also a rule of law. In *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (2) Blackburn J. delivers the judgment of the Court. He says: "There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to shew that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot retain the horse and claim back the whole price, unless there was a condition to that effect in the contract." And of course there can be no successful claim, after completion, for damages for misrepresentation unless that misrepresentation was fraudulent.

It appeared to me from the first, upon this case, that this fact—the absence of fraud and the absence of any allegation of fraud—was a fatal objection to the action, and I should be

(1) 37 Ch. D. 96. (2) L. R. 2 Q. B. 580, 587.

JOYCE J. 1904 SEDDON v. NORTH EASTERN SALT COMPANY, LIMITED.

perfectly justified in disposing of it on those grounds alone, and saying no more about the facts of the case. But I will add just a few words about the facts as they have been gone into so fully. If the plaintiff be right, the contract in question, of course, is not void but voidable only, and it was the duty of the plaintiff, bearing in mind the peculiar nature of the property, to repudiate the contract at the very earliest possible moment when he found out that any misrepresentation had been made, if, in fact, any was made. In my opinion the plaintiff did not do this, but, taking possession, he went on treating the property as his own in many ways for many months, and continued to do so long after the time when he had the information which would lead him, and ought to have led him, at once to the conclusion that he had been misinformed, if, in fact, he had been misinformed. It is quite plain to my mind that the correspondence between the plaintiff and Mr. Storr does not amount to an arrangement that the plaintiff is to be entitled to go on dealing with the property as his own without prejudice to the question of whether he is to be entitled to rescind the contract and repudiate the property or not. Really, as far as I understand it, there never was a suggestion about repudiating the property and rescinding the contract until the commencement of the action. In the solicitor's letter which precedes the commencement of the action there is not even a suggestion of repudiating the property and rescinding; but all that he says is, "I am going to commence an action and claim against you compensation in damages."

I think I ought to add also that upon the whole evidence I am not satisfied that there was any misrepresentation that induced the plaintiff to enter into the contract. I very much doubt whether there was any misrepresentation at all. His own account is that in answer to his question Mr. Hewett made some answer, and Mr. Storr said nothing. In *Walters* v. *Morgan* (1) Lord Campbell said that "a nod or a wink, or a shake of the head, or a smile" may do. Of course there may be peculiar circumstances. A statement may have been

(1) 3 D. F. & J. 724.

made to somebody who remained silent. But, as far as I know, silence has never yet been held to amount to misrepresentation. However, Mr. Storr and Mr. Hewett were both called, and they gave quite a different account of the matter as to what happened. I think there is no reason to question the veracity either of Mr. Storr or Mr. Hewett. I think on the whole evidence that practically the only representation that was made, if any, was in effect, "The weekly balance-sheets do not shew a loss of more than or as much as 250*l.*"; and that was a statement which, in my opinion, was not untrue or substantially inaccurate. Further, I am not satisfied that the representation made had the effect of causing the plaintiff to enter into the contract now sought to be rescinded or that it had any effect upon him at all. I think he wanted the business, and that he intended to take the risk whatever it was. Under these circumstances, of course, that portion of the action founded on misrepresentation fails as well as the other, and it must be dismissed with the usual consequences.

Solicitors for plaintiffs: *Grant, Bulcraig & Co., for Parker & Ayre, Manchester.*

Solicitors for various defendants: *Crump, Sprott & Co., for Archer, Parkin & Archer, Stockton-on-Tees; Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool; J. H. Hortin.*

G. A. S.

JOYCE J. 1904 Dec. 15, 16.

ATTORNEY-GENERAL *v.* STAFFORDSHIRE COUNTY COUNCIL.

[1904 A. 296.]

Local Government—County Council—Main Road—Maintenance and Repair—Embankments—Retaining and Supporting Walls—Mandatory Order—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.

The liability imposed upon county councils by s. 11 of the Local Government Act, 1888, of maintaining and repairing main roads is general, it being left to them to determine the best means of discharging that liability. The Court will not prescribe what particular works or repairs are necessary for the maintenance of the roads.

No mandamus will lie against a local authority to do any particular works.

Whether any liability, as distinct from duty, is imposed upon county councils by the section, *quære*.

TRIAL OF ACTION.

This was an action brought by the Attorney-General at the relation of the Hon. H. Parker and F. W. Fane, who were the trustees of certain estates of Lord Macclesfield in the county of Stafford under a settlement dated December 30, 1865. The trustees themselves were co-plaintiffs. Upon certain lands forming part of the settled estates was a highway known as the Leek and Macclesfield main road. It was vested in the defendants under s. 11 of the Local Government Act, 1888. By that section it is enacted (inter alia) that every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878, shall be wholly maintained and repaired by the council of the county in which the road is situate. The road in question had in various places where it passed through the Macclesfield estate been cut out of the side of a hill or sloping ground. In such places the road was supported on the lower side by embankments kept up by supporting stone walls, and the soil of the adjoining lands on the upper side was kept up by similar retaining stone walls. These walls had, as the plaintiffs alleged, always been repaired and maintained by the

highway authorities for the time being until the Local Government Act of 1888 came into operation, since which time they had been repaired and maintained by the defendants until the year 1902, when the defendants disputed their liability to continue the repair and maintenance. The plaintiffs also alleged that certain of the embankments and walls were out of repair and were insufficient to protect the highway from the adjoining land above slipping down on to the road, and that the embankments and walls were a nuisance, and the road where they were situate was in a dangerous condition and unsafe for public use. They claimed (1.) a declaration that the defendants were liable to repair and maintain the said embankments and walls; and (2.) that the defendants should be ordered forthwith to repair such of the embankments and walls as were in need of repair.

The defendants denied that the walls or embankments were any part of the road, or in any way necessary to its existence or maintenance or safety. They further denied that the walls had been repaired by them or by any previous highway authority, and contended that if any previous highway authority had in fact maintained or repaired them they did so under mistake and without any power or duty to do so, and their alleged acts did not impose any duty or liability on the defendants. The defendants also denied that the walls or embankments were in fact out of repair, or insufficient to prevent the adjoining lands from slipping on to the highway. They also submitted that there was no ground for the interposition of the Attorney-General, that he was not entitled to any relief, and that there was no right of action or ground of relief in the plaintiffs, the trustees.

Hughes, K.C., and *R. C. Glen*, for the plaintiffs. The defendants are liable under the Local Government Act, 1888, s. 11, for the maintenance of these walls. They are bound to do everything that is necessary for maintaining the road and protecting it from injury: *Sandgate Urban Council* v. *Kent County Council*. (1) The upper walls are out of repair and

(1) (1898) 79 L. T. 425.

JOYCE J. 1904 ATTORNEY-GENERAL v. STAFFORDSHIRE COUNTY COUNCIL.

likely to give way, in which case the soil which they now retain would fall upon the road. This constitutes a danger and a nuisance to the public: *Reg.* v. *Watson.* (1) A person who has sustained an injury through the neglect of a local authority has a right of action independently of the Attorney-General: *Baron* v. *Portslade Urban Council.* (2)

It is not necessary to give evidence of actual damage: *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (3) See also Highways and Locomotives (Amendment) Act, 1878, s. 13, *Attorney-General* v. *Ashbourne Recreation Ground Co.* (4), and *Attorney-General* v. *Wimbledon House Estate Co.* (5)

Danckwerts, K.C., and *John Leslie*, for the defendants. This action is misconceived. There is no jurisdiction to make the order asked for. The only question in *Sandgate Urban Council* v. *Kent County Council* (6) was with reference to the contribution to the cost of repairs as between two authorities. That case has no application to the present. The only duty of the county council in reference to main roads is under s. 11 of the Local Government Act, 1888.

Prior to the Act of 1878 "main roads" were unknown. They are dealt with by s. 13 and following sections of that Act.

The duty now imposed upon the county council with reference to main roads is the same as that formerly imposed upon highway boards and surveyors of highways. It is as successors to these authorities that the county councils are now liable. Originally the liability to maintain the roads was on the inhabitants of the parish unless specially exempted: *Rex* v. *St. George's, Hanover Square* (*Inhabitants*) (7); *Reg.* v. *Brightside Bierlow* (*Inhabitants*). (8)

By the common law, where a highway was dedicated to the public eo instanti the duty of the inhabitants of the parish to repair arose: *Rex* v. *Leake* (*Inhabitants*). (9)

The only liability as distinct from duty is on the inhabitants

(1) (1703) 2 Ld. Raym. 856.
(2) [1900] 2 Q. B. 588.
(3) (1882) 21 Ch. D. 752.
(4) [1903] 1 Ch. 101.
(5) [1904] 2 Ch. 34.
(6) 79 L. T. 425.
(7) (1812) 3 Camp. 222; 13 R. R. 792.
(8) (1849) 13 Q. B. 933.
(9) (1833) 5 B. & Ad. 469; 39 R. R. 521.

of the parish. The county councils are, as the old surveyors of highways were, merely agents of the inhabitants of the parish, and as such not liable to an action for damage resulting from a highway being out of repair: *Young* v. *Davis*. (1) That case was approved in *Cowley* v. *Newmarket Local Board*. (2) The liability of the inhabitants was to fit the roads to take the ordinary traffic of the district. No further liability can be enforced, and the Courts have always held that the only liability is to produce the required result: *Reg.* v. *Cluworth* (*Inhabitants*) (3); *Reg.* v. *Stretford* (*Inhabitants*) (4); *Rex* v. *Landulph* (*Inhabitants*) (5); *Reg.* v. *Henley* (*Inhabitants*) (6); *Reg.* v. *High Halden* (*Inhabitants*) (7); *Leek Improvement Commissioners* v. *Stafford Justices* (8); *Rex* v. *Devon* (*Inhabitants*). (9) The manner in which the liability is to be fulfilled is entirely a matter of discretion for the authority: *Reg.* v. *Claxby* (*Inhabitants*) (10) and *Sandgate Urban Council* v. *Kent County Council*. (11) The existence of a turnpike trust did not relieve the inhabitants of the parish from liability: *Rex* v. *Netherthong* (*Inhabitants*) (12); *Reg.* v. *Preston* (*Inhabitants*) (13); *Rex* v. *Llandilo Commissioners* (14); *Reg.* v. *Poole Corporation*. (15) An indictment would not lie against a highway board for repairs: *Loughborough Highway Board* v. *Curzon* (16); and no mandamus would lie against turnpike trustees: *Reg.* v. *Trustees of Oxford and Witney Turnpike Roads*. (17) No action will lie for mere non-feasance: *Cowley* v. *Newmarket Local Board* (2); and the Court will not make a declaration before the occasion for it arises: *Honour* v. *Equitable Life Assurance Society of the United States*. (18) The Court will only make a declaration where it is ancillary

(1) (1862) 2 H. & C. 197.
(2) [1892] A. C. 345.
(3) (1704) 1 Salk. 359.
(4) (1705) 2 Ld. Raym. 1169.
(5) (1834) 1 Mood. & Rob. 393; 42 R. R. 812.
(6) (1847) 2 Cox C. C. 334.
(7) (1859) 1 F. & F. 678.
(8) (1888) 20 Q. B. D. 794.
(9) (1825) 4 B. & C. 670; 28 R. R. 440.
(10) (1855) 24 L. J. (Q.B.) 223.
(11) 79 L. T. 425.
(12) (1818) 2 B. & Al. 179.
(13) (1838) 2 Lew. C. C. 193.
(14) (1788) 2 T. R. 232; 1 R. R. 466.
(15) (1887) 19 Q. B. D. 602.
(16) (1886) 16 Q. B. D. 565; 17 Q. B. D. 344.
(17) (1840) 12 Ad. & E. 427; 54 R. R. 591.
(18) [1900] 1 Ch. 852.

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to legal rights: *Williams* v. *North's Navigation Collieries*. (1) See also *Barraclough* v. *Brown*. (2) The defendants do not deny that it is their duty to repair the walls, but the fulfilment of that duty is in their discretion.

[JOYCE J. I am asked to declare what particular works they are to do.]

Yes. We admit we are bound to maintain the road. If we do not we are liable to proceedings under s. 94 of the Highway Act of 1835. It is not for this Court to say whether the road is in repair or not: *Reg.* v. *Greenhow* (*Inhabitants*). (3) The Court will not prescribe the mode of repair.

The fact that the defendants have repaired in the past will not impose a continuing liability upon them: *Rex.* v. *Llandilo Commissioners*. (4) The proper remedy, where such a case as this is made out, is so appropriate that it is difficult to see what can be gained by coming to this Court for relief.

Hughes, *K.C.*, in reply. The walls were erected for the purpose of keeping up the adjoining land, and if not maintained the land will fall upon the road and cause a dangerous obstruction. There is no dispute as to the supporting walls. The retaining walls are just as necessary for the maintenance of the road as an unobstructed highway as the supporting walls. As to the form of the action, no other course was open to the plaintiffs. The only other course suggested is under s. 94 of the Highway Act of 1835. But that section does not apply. The jurisdiction of the justices is expressly excluded by the proviso "in any case where the duty or obligation of repairing the said highway comes in question." Apart from that, there is no other way of getting relief. Sect. 11 of the Act of 1888 is perfectly plain. The word "maintained" in that section cannot be restricted to the mere keeping of the surface in repair. "Maintenance" includes everything that is necessary to protect the road: *Sandgate Urban Council* v. *Kent County Council*. (5) The position of a county council is wholly

(1) [1904] 2 K. B. 44, 49.
(2) [1897] A. C. 615.
(3) (1876) 1 Q. B. D. 703.
(4) 2 T. R. 232; 1 R. R. 466.
(5) 79 L. T. 425.

different from that of a surveyor of highways or highway board, inasmuch as the roads are vested in the county council.

There is a wide distinction between s. 11 of the Act of 1888 and s. 144 of the Public Health Act, 1875, which was in question in *Cowley* v. *Newmarket Local Board.* (1) If that view be right, it is unnecessary to consider the earlier authorities. We do not press for a mandatory order. Declaratory orders have been made in many cases under Order XXV., r. 5: *Young* v. *Ashley Gardens Properties, Ld.* (2)

No doubt if there is a statutory remedy that takes away the right to come for a declaration: *Barraclough* v. *Brown.* (3) In every other case the jurisdiction of the Court is undisputed: *Ellis* v. *Duke of Bedford* (4); *Llandudno Urban Council* v. *Woods* (5); *Attorney-General* v. *Merthyr Tydfil Union* (6); *Islington Vestry* v. *Hornsey Urban Council* (7); *Attorney-General* v. *West Riding County Council.* (8)

Assuming that there is some other method of compelling the county council to perform its duty, that does not take away the jurisdiction from the Court: *Attorney-General* v. *Ashbourne Recreation Ground Co.* (9); *Attorney-General* v. *Wimbledon House Estate Co.* (10) There is nothing to prevent the Attorney-General from bringing an action to enforce the performance of a public duty; nor is there anything to oust the jurisdiction of this Court in the present case.

JOYCE J. This is ostensibly an action to compel the Staffordshire County Council to perform the statutory duty imposed upon them by the 11th section of the Local Government Act, 1888, to maintain and repair a certain main road, it being alleged that default has been made by them in the performance of that duty by their failing to keep in repair certain retaining walls by the side of the road. In my opinion the real object of this action is to compel the Staffordshire County Council to keep up the retaining walls upon land

(1) [1892] A. C. 345.
(2) [1903] 2 Ch. 112.
(3) [1897] A. C. 615.
(4) [1899] 1 Ch. 494, 514.
(5) [1899] 2 Ch. 705.
(6) [1900] 1 Ch. 516, 550.
(7) [1900] 1 Ch. 695.
(8) (1903) 1 L. G. R. 223.
(9) [1903] 1 Ch. 101.
(10) [1904] 2 Ch. 34.

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forming part of the Macclesfield estate where it adjoins the road from Leek to Macclesfield, and the adjacent ground is on a higher level than the road.

Now the plaintiffs seek to get what they want in this way. They say that the 11th section of the Local Government Act, 1888, imposes upon the county council a statutory liability to maintain and repair the road. Next they say, as a sort of corollary to this, that they are therefore bound to keep in repair every work or other thing that may be necessary for the maintenance of the road. They say that the existence of such retaining walls as I have mentioned is necessary, and, therefore, the county council is bound to maintain and repair them, and, I suppose, they must go to the extent of saying that the county council is bound to keep them in a perfect condition of repair. It seems to me to be impossible to impose such a liability in terms upon the county council without really extending their liability beyond that which is expressed in the statute.

Now what do the plaintiffs claim in this action? They claim, or did claim, a declaration that the defendants are liable to repair and maintain the said embankments and walls, meaning thereby, as has been explained to me, the embankments or walls mentioned or referred to in the particulars that have been delivered in the action; and, secondly, they ask that the defendants may be ordered forthwith to repair such of the said embankments and walls as are in need of repair. In my opinion no such mandatory order as that which is asked for, or was asked, can be made. Further, in my opinion it is the necessary requisite of every injunction and every mandatory order that it should be certain and definite in its terms, and it must or ought to be quite clear what the person against whom the injunction or order is made is required to do or to refrain from doing. Now a mandatory order, as I understand the practice of the Court, will not be made to direct a person to repair. As we all know, the Court will not superintend works of building or of repair. Feeling this difficulty, I suppose when the case was opened such part of the claim as asks for a mandatory order was practically dropped, and I am now

asked to make a declaration that the Staffordshire County Council is liable to retain and maintain certain walls at points marked on a certain plan, without saying anything about the height and length of the walls, or as to the extent or amount of the repairs to be executed, or as to the time when such repairs ought to be executed—as to all of which matters there may be a considerable difference of opinion. How can I possibly say that these particular retaining walls, even if the height and length and so on had been specified, are necessary to the maintenance and repair of this main road? At all events, it appears to me on the evidence that it is impossible to come to the conclusion that the repairing of these particular walls is necessary for the maintenance of the main road.

Now in the case of *Sandgate Urban Council* v. *Kent County Council* (1) the matter had gone beyond the stage of determining whether it was necessary to do the work or not. It was a question simply of repayment by the person liable to pay for what had been necessary to be done. The facts were all found, and there was no escaping from them. The question was merely whether a certain person had to pay when the facts had been found by a reference to arbitration; but even in that very case, as was pointed out to me, Lord Davey says (2): "There is no liability upon the road authorities which could be enforced either by indictment or otherwise, to do any particular work. Their liability, either at common law or by statute, is general, to repair and maintain the highway, leaving it to them to find out the best, or at any rate adequate, means of discharging that liability." No case has been cited to me in which the Court has taken upon itself to say what the local authority is to do—that is, to particularize what has to be done. I do not hesitate to say that I am unable and I decline to prescribe what particular works are necessary, or where or when they may be necessary, for the maintenance of this main road; and I equally say that I am unable and decline to prescribe what repairs are necessary for the purpose of maintaining this main road, or where or when such repairs are to be made. As in the case cited to me of *Reg.* v. *Trustees*

(1) 79 L. T. 425. (2) 79 L. T. 429.

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of Oxford and Witney Turnpike Roads (1), it is plain under the old law, and it was so decided, that no mandamus would lie against the local authority, in a case as similar to this as it could be, to do any particular works. If this main road, or any part of it, should be allowed to go actually out of repair, the person, or the body, whoever it may be, that is responsible will be liable on the appropriate legal proceeding at the instance of any one who is entitled by law to proceed against them. At present, as it seems to me, the road is maintained, and I hold upon the evidence that it is not out of repair.

Then, again, it was suggested that the state of the road was a public nuisance. Upon the evidence this is certainly not proved to be the case, and I am of opinion upon the evidence that these walls in their present condition are not dangerous, nor do I think there is anything amounting to a public nuisance.

Then, further than this, an elaborate argument has been addressed to me by Mr. Danckwerts on behalf of the defendants with the object of shewing that the legal liability, if any, to the public in respect of this work, or any works on these roads, is in the inhabitants of the parish, and that the only liability of the county council is as successors to the highway board or surveyor of highways, and that the real liability is in the inhabitants of the parish alone; in other words, that the defendants are under no liability to the plaintiffs; further, that there is a particular procedure pointed out by the Act to be taken in such a case as this, and that such an action as this under the circumstances would not lie. I must say that I am very considerably impressed by that argument. It does not appear to me however to be necessary for this case to decide whether it is right or wrong, because, for the reasons I have already mentioned, apart from this, I am of opinion that the action is misconceived, and I am also of opinion that it fails on the merits. It must, therefore, be dismissed with the usual consequences.

Solicitors: *Lawrence, Graham & Co.; H. M. Davis, for the Clerk to the Staffordshire County Council.*

(1) 12 Ad. & E. 427; 54 R. R. 591.

G. A. S.

In re COHEN & COHEN.

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Dec. 13, 14.

Costs—Taxation—Third Party—Solicitors Act, 1843 (6 & 7 *Vict.* c. 73), *s.* 38.

Where a third party obtains an order to tax a bill under s. 38 of the Solicitors Act, 1843, the bill must be taxed as between the solicitor and the client, and not as between the solicitor and the third party, though items outside the scope of the third party's liability must as against him be disallowed.

The office practice certified by the masters in *In re Longbotham & Sons*, [1904] 2 Ch. 152, so far as inconsistent with this principle, is erroneous.

In re Brown, (1867) L. R. 4 Eq. 464, *In re Negus*, [1895] 1 Ch. 73, *In re Gray*, [1901] 1 Ch. 239, and *In re Longbotham & Sons*, [1904] 2 Ch. 152, followed.

SUMMONS to review taxation.

This was a third-party taxation arising under the following circumstances.

In 1902 the client and the third party brought cross-actions against each other.

By an agreement dated January 12, 1904, and made between the third party of the one part and the client of the other part, it was agreed that the actions should be stayed, and that the third party should pay the client's costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed."

The bill delivered on February 24, 1904, amounted to 486*l*. It contained many unusual items incurred on the client's express instructions, e.g., the employment of a King's counsel as well as a junior to settle statement of claim and advise on evidence.

On April 30, 1904, the third party obtained the usual third-party order for taxation under s. 38 of the Solicitors Act, 1843, on submitting to pay what should appear to be due to the solicitors on taxation.

The master disallowed items to the amount of 111*l*. as unusual and unreasonable for the third party to pay, and allowed only 375*l*.

The solicitors carried in objections to the effect that the

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agreement was an indemnity agreement, and that in any case the bill must be taxed as between the solicitors and the client, and all items properly allowable against the client and within the scope of the agreement must be allowed against the third party.

On July 6, 1904, the master made the following note in reply to the objections: "By consent these objections are disallowed in block, and need not be answered by me in detail, the questions for the Court being on what principles these costs are to be taxed; on an indemnity as between solicitor and his own client, or what is fair and proper for a third party to pay."

On July 13, 1904, he delivered formal answers dealing more fully with the objections. He stated that he was unable to construe the agreement as an indemnity for all costs incurred between the solicitors and the client. He considered that the unusual expenses ought to have been notified to the third party before he signed the agreement. He also stated that he had followed the principle of *In re Gray* (1), namely, that the Court was bound to look at the nature of the items and to consider apart from the order whether the third party was under any liability to pay them. After referring to *In re Negus* (2), *Re Abbott* (3), and *In re Morecroft* (4), the principles of which were in the opinion of the masters considerably extended by *In re Gray* (1), and after referring to *Re Holliday and Godlee* (5), which he thought was not followed in *In re Gray* (1), and after referring to *In re Longbotham & Sons* (6), then only reported in the *Weekly Notes* (7), the master proceeded: "I have followed the practice in the Taxing Office on taxations under this section, and I have taxed apart from the order as between the solicitor and the party liable to pay, and I have disallowed several items which did not come in my opinion within the scope of the said agreement." The master also held that on the true construction of the agreement the third party was only to pay

(1) [1901] 1 Ch. 239.
(2) [1895] 1 Ch. 73.
(3) (1861) 4 L. T. 576.
(4) (1885) 29 Sol. J. 471.
(5) (1888) 58 L. T. 301.
(6) [1904] 2 Ch. 152.
(7) [1904] W. N. 78, 118.

the client's costs that were reasonably and properly incurred, and that unusual charges and luxuries must be borne by the client. He stated that he had taxed the costs item by item, and allowed what in the exercise of his judgment and discretion were fit and proper for the third party to pay, and that he did not see that the items disallowed were reasonably incurred, but were extra costs increased through over-caution, and the special fees paid were unusual and unnecessary expenses, and were luxuries the expense of which must be borne by the client ordering them.

The solicitors took out this summons to review.

Hon. E. C. Macnaghten, K.C., and *Harry Greenwood*, for the solicitors. The master has taxed on a wrong principle.

In the first place, the agreement was an indemnity agreement and covered all costs that the client was liable to pay. The fact that some of them were luxuries and that the third party was not notified of them is immaterial.

Secondly, by electing to tax under s. 38 the third party is precluded from objecting to any item allowable against the client and within the scope of the agreement. If he wished to dispute any items as unreasonable he should have refused to pay, and left the client to bring an action: *Re Holliday and Godlee* (1), approved in *In re Gray* (2), which was in effect affirmed by *In re Longbotham & Sons.* (3)

The master has taxed the bill as between the solicitors and the third party in accordance with the office practice certified in *In re Longbotham & Sons.* (3) This practice is directly contrary to the decisions, all of which require the taxation to be between the solicitors and the client: *Re Abbott* (4); *In re Brown* (5); *In re Morecroft* (6); *Re Holliday & Godlee* (1); *In re Negus* (7); *In re Gray* (2); *In re Longbotham & Sons.* (3)

Peterson, for the third party. The Taxing Office practice was approved by Kekewich J. in *In re Longbotham & Sons* (3), and his decision was affirmed. The master has to consider

(1) 58 L. T. 301.
(2) [1901] 1 Ch. 239.
(3) [1904] 2 Ch. 152.
(4) 4 L. T. 576.
(5) L. R. 4 Eq. 464.
(6) 29 Sol. J. 471.
(7) [1895] 1 Ch. 73.

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whether the items are such as a third party is liable to pay: *In re Gray.* (1) A third party is not bound to pay items however exorbitant: *In re Brown* (2); *In re Longbotham & Sons.* (3) The master's duty is regulated by Order LXV., r. 27, sub-r. 29, which provides that: "On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

This rule applies to solicitor and client as well as party and party taxations: *In re Ermen* (4); and therefore luxurious items must not be allowed.

[SWINFEN EADY J. There is no difficulty about the law or practice. The only question is how the master has applied it. He says he has taxed as between the solicitors and the third party. That is wrong. He has disallowed items not within the scope of the agreement. That is right. I must see him, and ascertain what he has really done before I give judgment.]

Hon. E. C. Macnaghten, K.C., in reply.

SWINFEN EADY J. In this case I have communicated with the master, and I am not satisfied that he has proceeded upon a wrong principle, but his certificate is, I think, open to the criticism that has been addressed to it.

So far as the practice is concerned there is no difficulty in ascertaining exactly what should have been done. The difficulty I felt was in appreciating exactly what had been done having regard to the language of the certificate and to the note and answers to the objections. In answer to the objections the master first made the following note: "By consent these objections are disallowed in block, and need not be answered by

(1) [1901] 1 Ch. 239.
(2) L. R. 4 Eq. 464.
(3) [1904] 2 Ch. 152.
(4) [1903] 2 Ch. 156.

me in detail, the questions for the Court being on what principles these costs are to be taxed; on an indemnity as between solicitor and his own client, or what is fair and proper for a third party to pay." This note, made while the matter was still before the master, was in effect superseded by the later answers, where the master says: "I have followed the practice in the Taxing Office on taxations under this section, and I have taxed apart from the order as between the solicitor and the party liable to pay."

It is upon the language of this part of the certificate that the difficulty has arisen.

It is quite clear from the decision in *In re Gray* (1), the principle of which was affirmed by the Court of Appeal in *In re Longbotham & Sons* (2), that where a third party obtains an order to tax it does not alter the nature or enlarge the scope of his liability. Cozens-Hardy J. stated that proposition in terms in *In re Gray* (1), and the Lords Justices in *In re Longbotham & Sons* (2) expressed their concurrence therewith. Vaughan Williams L.J., after referring to *In re Negus* (3) and *In re Gray* (1), says: "I think that all that is necessary for us to do in our present judgment is to affirm the principle of those two decisions." At the same time, it is equally clear from *In re Gray* (1) "that the bill to be taxed is the bill between the solicitor and his own client; and that the third party can only tax it on the condition of paying what is due to the solicitor from his own client, which may be more than the client, if he had paid it, could have recovered over from the third party." In *In re Longbotham & Sons* (2) Romer L.J. says: "When a third party taxes a bill under s. 38 of the Act of 1843, it is clear both from the wording of the section itself and the authorities, that the taxation must be on the footing of a taxation between the solicitor and the client"—that is to say, that the bill must be taxed as between the solicitor and the client and not as between the solicitor and the third party.

Now it is quite clear that this is not an indemnity taxation. The cases of *In re Gray* (1) and *In re Longbotham &*

(1) [1901] 1 Ch. 239, 244, 246. (2) [1904] 2 Ch. 152, 156, 158.
(3) [1895] 1 Ch. 73, 80.

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Sons (1) followed older authorities, as Vaughan Williams and Romer L.JJ. pointed out. In *In re Brown* (2) Lord Romilly M.R. was dealing with a third-party taxation on the application of a cestui que trust whose trustee had paid the bill. The master disallowed a considerable number of items, and, in particular, charges for certain attendances upon the trustee, and for letters written to him or to third parties by his direction, and Lord Romilly M.R. affirmed his decision.

That case affords a very good illustration of the rule that there may be a considerable number of items for which the client may be liable to the solicitor, e.g., items incurred on his express instructions, which the third party may not be liable to pay. That is quite consistent with the rule that when once the items for which the third party is liable are ascertained the taxation of those items must proceed upon the footing of a taxation as between the solicitor and the party chargeable, and not as between the solicitor and the third party.

In re Negus (3) affords another illustration of the same rule. It was there held that the lessee was not liable to pay for the costs of the counterpart lease, but it did not at all follow that the solicitor was not entitled to recover those costs from his client, the lessor for whom he had acted. It was an item for which the third party, the lessee, was not liable, but for which the party chargeable was nevertheless liable to his own solicitor.

In dealing with the point Chitty J. says: "This is a third-party taxation, and the general rule is that a third party stands, as between himself and the solicitor whose bill he is taxing, in the position of the party chargeable"—that is to say, as regards the taxation. "But that rule does not prevent the taxing master from considering the question of the liability of the third party"—that is to say, from considering for what items the third party is properly liable.

Under these circumstances, I am of opinion that the practice as laid down in all the four cases to which I have referred is clear, but I am not satisfied with the language of the master's

(1) [1904] 2 Ch. 152, 156, 158. (2) L. R. 4 Eq. 464.
(3) [1895] 1 Ch. 73, 80.

certificate, and if he has followed that practice he has not so stated, and his certificate is in that respect open to the criticism addressed to it. He does not say that he has taxed as between the solicitors and the party chargeable, but as between the solicitors and the party liable.

Under these circumstances, I do not think it would be satisfactory to allow the matter to stand in its present position, and it must therefore go back to the master. It will be for him to consider whether the slip made was merely in the language of his certificate, or in the principles upon which he has in fact taxed the bill. Under the agreement the third party is liable to pay the client's costs "as between solicitor and client relating to the matters in dispute in the said two actions," and it is those costs that have to be taxed; but, in my opinion, this is not an indemnity taxation, and it does not follow that because on this taxation items for which the third party is not liable are disallowed those items have not been authorized by the client. It may well be that the solicitors will be entitled to recover them against their client, but the liability of the third party is not enlarged or increased by his obtaining the third-party order.

The proper order will be to send the matter back to the master to review his taxation and amend his certificate. Whether the ultimate result of the taxation will be altered will depend on whether he has in fact proceeded on the principles I have indicated. If he has the result will remain the same, but the language of the certificate must be altered.

In conclusion, I should say that the master appears to have followed the language of the certificate given by the taxing masters to Kekewich J. in *In re Longbotham & Sons.* (1) The taxing masters appear to have been of opinion that *In re Gray* (2) had altered the practice, and they stated that "since that case the practice in the Taxing Office in taxations under this section has been to tax, apart from the order, as between the solicitor and the party or estate liable to pay." The matter was, however, put as clearly as possible by Romer L.J.,

(1) [1904] 2 Ch. 152, 153. (2) [1901] 1 Ch. 239.

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who said that the taxation must be on the footing of a taxation between the solicitor and the client.

As I am not at present satisfied that the applicants have obtained more than a formal success, their costs of this summons will be their costs in the taxation.

Solicitors: *Cohen & Cohen; Slark, Edwards & Co.*

G. R. A.

WARRINGTON J.

1904

Dec. 13.

In re EASTERN INVESTMENT COMPANY, LIMITED.

Company — Voluntary Winding-up — Dissolution — Stay of Proceedings — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 89, 138, 142, 143.

Though there is no jurisdiction to make an order directly extending the period of three months prescribed by s. 143 of the Companies Act, 1862, for the dissolution of a company in voluntary liquidation, the Court has jurisdiction, after the registration of the return, but before the expiration of the three months limited by this section, to make an order under ss. 89 and 138 in the matter of the voluntary winding-up to stay all proceedings in relation to such winding-up, and so keep the company on foot notwithstanding the expiration of the three months limited by s. 143.

In re Crookhaven Mining Co., (1866) L. R. 3 Eq. 69, discussed and applied.

MOTION.

This was an application made after the registration of the return required by s. 143 of the Companies Act, 1862, but before the expiration of the three months limited by that section, to obtain a postponement of the automatic dissolution of the company under the following circumstances:—

In April, 1903, an agreement was entered into with a view to the amalgamation of two companies, under which the assets of the Eastern Investment Company, Limited, were to be transferred to a new company in consideration of certain fully paid-up shares in the new company. Among the assets to be transferred were certain interests and participations in mining claims in the Transvaal, which were entered upon the local registry in the names of trustees in trust for the persons

equitably entitled (including the company) in various defined shares and proportions.

In May, 1903, the company went into voluntary liquidation; the liquidator transferred some of the assets to the new company, and directed the persons in whose names the aforesaid mining claims were entered in the registry to hold the same in trust for the new company. The liquidator then made up the account required by s. 142 of the Companies Act, 1862, called a general meeting of the company in accordance with that section, and made the return to the Registrar of Joint Stock Companies under s. 143, with the result that the company would be "deemed to be dissolved" on December 22, 1904. It was subsequently discovered that, in order to satisfy the revenue requirements of the Transvaal, it was necessary that the interests in the mining claims should first be transferred by the trustees to the old company, and then transferred by the old company to the new company, and there was not time to get this done before the dissolution of the old company on December 22.

The liquidator of the old company, and the new company, now applied by motion in the matter of the voluntary winding-up to extend the period of three months prescribed by s. 143 for the dissolution of the company, or for an order to stay proceedings in the winding-up.

Jessel, for the motion. It appears from *Scottish Fluid Beef Co.* v. *Auld* (1) that there is no jurisdiction to suspend the operation of s. 143 or extend the period of three months limited by that section; the application must, therefore, be confined to asking for a stay of proceedings in the winding-up, and this will have the effect of preventing the dissolution of the company until the necessary transfers can be executed. That there is jurisdiction before the expiration of the three months to make an order in the matter of the winding-up is clear from *In re Crookhaven Mining Co.* (2) Under s. 89 of the Companies Act, 1862, the Court can stay proceedings in relation to winding-up.

(1) (1898) 25 R. 1056. (2) L. R. 3 Eq. 69.

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[WARRINGTON J. Upon the application of a creditor or contributory; this is an application by the liquidator and the new company.]

The motion can be amended by adding a contributory, so as to comply with the requirements of this section. It is plainly right that this winding-up should be stayed; if not, there will be no one to assign these mining claims to the new company. Sect. 138 of the Companies Act, 1862, provides a means of access to the Court in a voluntary winding-up: the effect of these two sections gives the Court the same power in a voluntary winding-up as in a winding-up by the Court or under supervision. If an order to stay is not made, the only course open would be to present a petition for a compulsory winding-up, and that would be expensive.

WARRINGTON J. This is a somewhat peculiar application: it is an application, when amended as suggested in the course of the argument, by a contributory under s. 138 of the Companies Act, 1862, asking the Court to exercise the power conferred upon it in a compulsory winding-up by s. 89, and to make an order staying all proceedings in relation to the winding-up of this company. The circumstances under which the present application is made are somewhat unusual. [Having shortly stated the facts as above, his Lordship continued:—]

It is admitted at the bar on the authority of *Scottish Fluid Beef Co.* v. *Auld* (1) that the Court has no jurisdiction to stay the dissolution of a company which takes place automatically under s. 143 by extending the period of three months prescribed by that section, and this part of the motion has not been pressed; but the applicants ask for the alternative relief I have already mentioned, namely, a stay of all proceedings in the winding-up, suggesting that if all proceedings in the winding-up are stayed, then the company necessarily continues to exist, and the operation of s. 143 will thus be prevented. There is no direct authority for this contention, but there is some authority in favour of the present application in *In re Crook-*

(1) 25 R. 1056.

haven Mining Co. (1) In that case the dissolution of the company had actually taken place when the order was made, though the petition asking for the order was presented before the expiration of the three months limited by s. 143, and Lord Romilly M.R. in giving judgment says: "At the time when this petition was presented, the Court unquestionably had jurisdiction, under the Companies Act, to order the call to be made, and I am of opinion that the delay in the hearing of the petition, caused by the intervention of the Long Vacation, cannot affect the rights of the petitioner, and that he is entitled to stand in the same position as if the petition had been heard before the expiration of three months from the 4th of June." Pausing there for a moment, I think it clear that Lord Romilly must have considered that he had jurisdiction to make the order asked for at the time when the petition was presented (August 31), and I think he must have considered that the dissolution of the company had not then taken place, because otherwise the order which was afterwards made would have been wrong. Then he goes on: "That being so, it is unnecessary that I should go into the question whether the 143rd section of the statute deprives the Court of its jurisdiction over a company which, under the provisions of that section, is deemed to be dissolved; I am inclined to think that it was not the intention of the Legislature, by any provision of this statute—which was intended to provide a less expensive and more speedy and direct method of winding up companies—to fetter the jurisdiction of the Court, and compel parties to resort to more circuitous and expensive remedies. There must be an order for a call upon the holders of shares not fully paid up, for the purpose of adjusting the rights of the shareholders." That is not a direct authority as to the effect of an order when it is made, but I think it is an authority entitling me to make the order I propose to make. When one looks at the wording of s. 89 of the Companies Act the language is very strong; the words are: "upon proof to the satisfaction of the Court that all proceedings in relation to such winding-up ought to be stayed" then the Court may "make an order staying the same,

(1) L. R. 3 Eq. 69, 72.

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either altogether or for a limited time, on such terms and subject to such conditions as it deems fit." Those words seem to me to cover everything, and if the winding-up of this company is still in operation, as I think it is until the dissolution has taken effect by the expiration of the three months limited by s. 143, then, if I am at liberty to stay "all proceedings in relation to such winding-up," I think those words are wide enough to effect what Mr. Jessel wants, namely, to keep the company on foot notwithstanding the expiration of the three months.

I propose, therefore, to make this order: The Court being satisfied that for the purpose of effecting the transfer of the assets of this company comprised in the agreement of April, 1903, to the new company, all proceedings in relation to such winding-up ought to be stayed, direct the same to be stayed accordingly, with liberty to apply.

Solicitors: *Travers-Smith, Braithwaite & Co.*

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MIDLAND COUNTIES DISTRICT BANK, LIMITED *v.* ATTWOOD.

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Dec. 16, 17, 21.

[1904 M. 3494.]

Company—Voluntary Liquidation—Agreement of Service—Resolution to wind up—Dismissal of Servant—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *s.* 131.

A resolution for the voluntary winding-up of a limited company does not operate as a notice of discharge to the servants of the company.

Shirreff's Case, (1872) L. R. 14 Eq. 417, examined and distinguished on this point.

MOTION.

This was an application for an interim injunction to restrain a former employee of the plaintiff company from committing a breach of a contract for service, which raised the question as to the effect of a voluntary winding-up on contracts of this nature.

The facts were as follows:—

By an agreement of November 10, 1891, between the plaintiff bank, by its then name of the Nottingham and District Bank, Limited, of the one part and the defendant of the other part, the defendant agreed to serve the bank as manager of their branches at Ilkestone and Eastwood "or elsewhere, and in the same or such other capacity as the said bank shall direct." By clause 2 of this agreement it was provided that the defendant should not "during the continuance hereof engage in any other business or calling whatsoever without the previous written consent of the said bank." After providing for the salary that was to be payable to the defendant, and for the termination of the agreement by one calendar month's notice on either side, clause 7 was as follows: The defendant "shall not within a year of the termination of this agreement, whether by notice or under the terms of the next clause," enter into the service of or in any way act for any bank carrying on business within a radius of five miles of Ilkestone, of Eastwood, or any branch of the said bank to

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which the defendant might hereafter be appointed as manager. A sum of 500*l.* was also fixed as liquidated damages in case of any breach by the defendant of this clause. By clause 8 the bank were empowered to put an end to the agreement in the event of the defendant being guilty of misconduct in connection with his duties. The defendant ceased to be manager of the Ilkestone and Eastwood branches and became, and until quite recently continued to act as, the manager of the plaintiffs' branch bank at Derby. By an agreement of November, 1904, the Birmingham District and Counties Banking Company, Limited, agreed to acquire the whole of the assets, undertaking, and goodwill of the plaintiff bank as from December 31, 1903, and for this purpose it became necessary to wind up the plaintiff bank, and accordingly by a special resolution, duly passed and confirmed on November 18 and December 3, 1904, it was resolved that the plaintiff bank be wound up voluntarily, and that two named persons should be appointed liquidators to adopt the agreement of November, 1904, and carry the same into effect on behalf of the plaintiff bank. The defendant was instructed to assist in the transfer of the business to the Birmingham District and Counties Banking Company, Limited, but on December 3, 1904, he left the plaintiffs' branch bank at Derby, and subsequently entered the service of the Nottingham Joint Stock Bank, Limited, for the purpose of opening and managing a new branch bank for that company at Derby. On December 5 the plaintiff bank gave the defendant a month's notice to determine their agreement of service with him, and commenced the present action to restrain the defendant from acting for the Nottingham Joint Stock Bank, Limited, or any other banking company at Derby or within five miles round, in breach of his agreement with the plaintiff bank of November 10, 1891. The Birmingham District and Counties Banking Company, Limited, was also joined as a plaintiff in the action.

R. J. Parker, for the plaintiffs, having stated the facts,

George Lawrence, for the defendant, admitted that he had no

defence on the merits, but raised the point of law that the voluntary winding-up of the Midland Counties District Bank, Limited, operated as a wrongful dismissal of the defendant and put an end to the agreement, and consequently that the restrictive provisions of clause 7 did not apply.

R. J. Parker, for the plaintiffs. A voluntary winding-up does not discharge the servants of the company, and in this respect differs from a compulsory winding-up, where the order operates as notice of discharge to all servants of the company: *Chapman's Case* (1); *MacDowall's Case.* (2) It differs in this respect also from the appointment of a receiver and manager in a debenture-holder's action, which has also been held to operate as a discharge of the servants of the company: *Reid* v. *Explosives Co.* (3) The reason for this is that the official liquidator and the receiver and manager are officers of the Court, whereas the voluntary liquidator is the servant of the company; the assets remain under the control of the company, the business may be continued by the directors if the company and the voluntary liquidator think fit, and there is in fact no change in the personality of the employer. In a winding-up the business is carried on by the Court with the assistance of the liquidator, and there is a change in the personality of the employer. In the present case there has been no change in the nature of the business and no change in the personality of the employer, and the reasons which apply in a compulsory winding-up do not apply here. *Shirreff's Case* (4), when examined, is not a direct authority that a voluntary winding-up operates as a dismissal of the servants of the company; that point was not argued.

George Lawrence, for the defendant. The restrictive provisions of clause 7 only apply in two events—(1.) termination of the agreement by a month's notice on either side, or (2.) dismissal of the defendant for misconduct under clause 8. Neither of these events has happened, but the agreement was put an end to by the voluntary winding-up, which operated as a dismissal of the servants of the company. *Shirreff's Case* (4) has always

(1) (1866) L. R. 1 Eq. 346.
(2) (1886) 32 Ch. D. 366.
(3) (1887) 19 Q. B. D. 264.
(4) L. R. 14 Eq. 417.

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been treated as an authority for this: Lindley on Companies, 6th ed. p. 1015; Buckley on Companies Acts, 8th ed. p. 400. By s. 131 of the Companies Act, 1862, the company ceases to carry on its business from the date of the commencement of the winding-up. In *Reid* v. *Explosives Co.* (1) Manisty J. seems to have assumed that the voluntary winding-up discharged Reid from his employment. The original business of the bank ceased from the passing of the resolution to wind up; what has been carried on since has been a different business: it has been the business of winding up the affairs of the Midland Bank; as was pointed out in *MacDowall's Case* (2), the defendant might have waived the effect of the winding-up and continued as manager; but he did nothing of the kind, for he left the plaintiffs' branch bank on December 3, the day the resolution to wind up was confirmed; the fact that the possession has been the same is not material. The fact, too, that the winding-up was only for reconstruction purposes makes no difference: *Horsey Estate, Ld.* v. *Steiger* (3), which was approved on this point in *Fryer* v. *Ewart.* (4)

[WARRINGTON J. In a compulsory winding-up the Act contemplates that the assets should be in the control or possession of the Court, to be collected and distributed with the assistance of its officer the official liquidator; there is no similar provision in the case of a voluntary winding-up.]

Sect. 133 provides for much the same method of winding-up by the liquidator. [The Companies Winding-up Rules, 1890, rr. 89 and 90, were referred to.] In each case the liquidator, whether official or voluntary, is only an agent of the company for winding up. In one case he is appointed by the Court to act for the company; in the other case he is appointed by the company itself: *In re Anglo-Moravian Hungarian Junction Ry. Co.* (5) The position so far as agency is concerned is the same. The agreement, therefore, came to an end the day on which the resolution to wind up was confirmed: if the dismissal was

(1) 19 Q. B. D. 264.
(2) 32 Ch. D. 369.
(3) [1899] 2 Q. B. 79.
(4) [1902] A. C. 187.
(5) (1875) 1 Ch. D. 130, 133.

wrongful the defendant had a right to treat the agreement as rescinded: *Lilley* v. *Elwin* (1); it was therefore no longer binding when he entered the service of the Nottingham Joint Stock Bank.

R. J. Parker, in reply. The change in the nature of the business is immaterial; but in a voluntary winding-up there is no change in the nature of the business. This is a contract to employ the defendant; the bank were not bound to find him work so long as they were ready to pay him his salary, and there would have been no breach if the business had ceased altogether, so long as the plaintiffs were ready to pay, and did pay, the salary: *Turner* v. *Sawdon & Co.* (2) There is no implied obligation in this contract to go on with the business: *Hamlyn & Co.* v. *Wood & Co.* (3); *Rhodes* v. *Forwood.* (4) A change in the personality of the employer puts an end to a contract of service: *Brace* v. *Calder* (5); *Phillips* v. *Alhambra Palace Co.* (6) What operates to discharge the servant is the change in the character of the person who carries on the business; in the present case the business carried on by the voluntary liquidator was the same business carried on by the same company by its agent the liquidator. There has been no change in the business or in the personality of the employer; the contract is, therefore, still in force and binding on the defendant. The case is really not covered by authority in *Shirreff's Case* (7); this point was assumed, not argued.

Cur. adv. vult.

Dec. 21. WARRINGTON J., after stating the facts, continued:—On these facts the plaintiffs would plainly be entitled to the relief they seek, unless the defendant has some defence in point of law. The only defence relied upon is founded upon the contention that the voluntary winding-up of the employing company operated in itself as a wrongful dismissal of the servants of the company, including the defendant, and that

(1) (1848) 11 Q. B. 742.
(2) [1901] 2 K. B. 653.
(3) [1891] 2 Q. B. 488.
(4) (1876) 1 App. Cas. 256.
(5) [1895] 2 Q. B. 253.
(6) [1901] 1 K. B. 59.
(7) L. R. 14 Eq. 417.

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he is not, under the circumstances, bound by the restrictive provisions of clause 7. The question I have to determine is whether this defence is well founded. It is well settled that an order for the compulsory winding-up of a company operates as a notice to dismiss the servants; and it has been decided by the Court of Appeal that the appointment by the Court of a receiver and manager in a debenture-holder's action has the same effect: *Reid* v. *Explosives Co.* (1) In order to determine whether a voluntary winding-up is to have that effect, one must consider what there is in the events I have mentioned which could terminate the agreement of service. It is contended by Mr. Lawrence that it is the change in the nature of the business carried on by the employer. On the other hand, it is contended by Mr. Parker that the change in the nature of the business is immaterial; that the circumstances in the cases I have mentioned which cause the termination of the relation is the change in the personality of the employer; the latter is, in my opinion, the correct view. If the business had ceased altogether that would have been no breach by the employer of his agreement with the servant, provided he had continued to pay his salary: see *Turner* v. *Sawdon & Co.* (2); and it seems to me, therefore, that the change from a going banking business to one that is being carried on with the view to a beneficial winding-up could not have the effect contended for. On the other hand, a change of personality certainly puts an end to the contract of service: see *Brace* v. *Calder.* (3) This change of personality appears to me to take place in a compulsory winding-up. The business is from the date of the winding-up order carried on by the Court for the purpose of liquidation with the assistance of the official liquidator, who is an officer of the Court. Is there, in a voluntary winding-up, a change in the personality of the employer? In my opinion there is not. In that case the assets of the company remain under the control of the company; the liquidator is an officer of the company; the business may even be continued by the directors, if either the company

(1) 19 Q. B. D. 264. (2) [1901] 2 K. B. 653.
(3) [1895] 2 Q. B. 253.

or the liquidators so think fit. The governing section in the Companies Act, 1862, as to the effect of a voluntary winding-up on the status of the company is s. 131, which runs thus: "Whenever a company is wound up voluntarily the company shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof." Those later words imply that for the beneficial winding-up of the company the company does continue to exist. Then the section, after providing that transfers of shares and alteration in the status of members shall be void, continues: "but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up." If, therefore, there is no authority binding me to decide otherwise, I should be prepared to hold that the voluntary liquidation did not operate to dismiss the servants of the company. Is there any such authority? The only case referred to as such is *Shirreff's Case* (1), and it is quite true that in that case Lord Romilly said: "I am of opinion that the resolution to wind up the company ipso facto put an end to Shirreff's employment as manager, and was equivalent to his dismissal." But the point was not argued. It was assumed that Shirreff's employment had been determined, as, in fact, it had been, for not only had the company been wound up, but Shirreff himself had been appointed liquidator and received 400*l.* for his services. The only question that was argued was whether he was entitled to prove for a certain sum payable to him under the articles of association in case he should be dismissed from his office as manager. I cannot, therefore, regard that case as an authority binding me to decide contrary to my own opinion. In *Reid* v. *Explosives Co.* (2) there had been an appointment of a receiver and manager by the Court in a debenture-holder's action, followed by a voluntary liquidation, and Manisty J. had held —but for what reasons I cannot ascertain—that the latter event had operated to dismiss the plaintiff, who had been in the service of the defendant company, but it was unnecessary

(1) L. R. 14 Eq. 417, 418. (2) 19 Q. B. D. 264.

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to decide the point, because the same learned judge decided that the appointment as a receiver and manager had had that effect; and in the Court of Appeal the point was not decided, and I infer that Lord Esher, at all events, inclined to the view that, inasmuch as in a voluntary liquidation the liquidator is appointed by, and is an officer of the company, there would not be such a change in the personality of the employer as to dismiss the servants. On the whole, I am of opinion that the defence fails, and that the injunction must go as asked by the notice of motion.

Solicitors: *Field, Roscoe & Co., for Pinsent & Co., Birmingham; Rawle, Johnstone & Co., for W. J. Holbrook, Derby.*

W. C. D.

HEMMINGS *v.* SCEPTRE LIFE ASSOCIATION, LIMITED.

KEKEWICH J.

1905

Jan. 19.

[1904 H. 1318.]

Life Insurance—Policy—Proposal—Misrepresentation—Avoidance—Mistake as to Age of Assured—Acceptance of Premiums after Knowledge of Mistake—Affirmance of Contract.

A policy of life assurance was granted upon the basis of a proposal which concluded with a declaration that the answers given in the proposal were true to the best of the proposer's knowledge and belief, and an agreement that the proposal and declaration should be the basis of the contract, and that if it should thereafter appear that the proposer had made any untrue statement therein the policy should be void and the premiums forfeited. In the proposal the assured made a mistake as to her age, and stated that she was three years younger than she was. The policy, after reciting the declaration and the statement by the assured as to her age, evidence of which the insurance company required to be produced, provided for the payment by the company of the policy moneys upon proof of the death of the assured, or of her having attained the age of sixty years, and it contained a proviso for avoidance of the policy and forfeiture of the premiums in the event of the policy having been obtained by wilful misrepresentation. After discovery of the mistake as to the age of the assured the company accepted two annual premiums:—

Held, (1.) following *Fowkes* v. *Manchester and London Life Assurance and Loan Association*, (1863) 3 B. & S. 917, that the declaration was to be read with the policy, and that the company were not entitled to avoid the policy and forfeit the premiums unless the statement in the proposal was designedly untrue, although upon the discovery of the mistake they might have declined to continue the policy upon returning the back premiums; (2.) that by accepting premiums after knowledge of the facts they must be taken to have affirmed the policy as it stood, and that consequently they were bound to pay the policy moneys upon the assured actually attaining the age of sixty years, and were not entitled to postpone payment until the assured had attained that age upon the assumption of her age at the date of the proposal having been as therein stated.

THIS action was brought by the assignee of a policy of assurance dated May 11, 1888, effected with the defendants, the Sceptre Life Association, Limited, by Blanche Mary Innes-Ker, the wife of Lord Charles Innes-Ker, on her own life, for a declaration that the policy was a valid and subsisting policy, and for payment of the policy moneys. In December, 1887,

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Lady Charles Ker signed a proposal for a policy of assurance on her own life with the defendant company, and stated therein that her age on her next birthday was forty-one, and that she was born on March 6, 1847. The proposal concluded with the following declaration: "I do hereby declare that the preceding answers and statement are, to the best of my knowledge and belief, correct and true, and that I have not withheld or concealed any fact or circumstance which the directors ought to know in accepting my proposal. And I do hereby agree that this proposal and declaration shall be the basis of the contract between myself and the association; and if it shall hereafter appear that I have made any untrue statement therein, then the policy to be issued shall be void, and the premiums paid shall be forfeited." Upon this proposal the policy above referred to was granted. By this policy it was recited that the assured had signed a declaration in writing, dated December 16, 1887, declaring that her age on the next birthday would not exceed forty-one years (evidence of which age had to be produced), which declaration she had agreed should be the basis of the contract between herself and the company; and it was witnessed that in case the assured should, on or before or within thirty days from March 1, 1889, and on or before or within thirty days from March 1 in every subsequent year until she should have attained the age of sixty years, pay to the directors of the defendant company the sum of 112*l.* 16*s.* 8*d.*, then the capital stock and funds of the company should be liable to pay to the executors, administrators, or assigns of the assured, immediately after satisfactory proof of her death should have been produced to the directors, or to the assured herself immediately after satisfactory proof had been given to the directors of her having attained the age of sixty years, the sum of 2000*l.*, together with certain further sums by way of bonus. The policy contained a proviso that in case the assurance thereby made should be proved to have been obtained by wilful misrepresentation, concealment, or other fraud in regard to any matters contained or referred to in the before-mentioned declaration or otherwise, then the policy should be void, and all payments

which should have been made to the defendant company on account thereof should be forfeited to the company.

On June 9, 1888, the policy was assigned to the plaintiff to secure a loan of 2000*l.*, and the payment of the interest on the loan and of the premiums was guaranteed by certain relatives of the assured. Notice of this assignment was duly given to the defendants. In 1897 it was discovered by the guarantors that the assured was born on March 6, 1844, and that her age on her birthday next after the declaration in her proposal was forty-four, and not forty-one as therein stated. The misstatement in the declaration was made by mistake. The defendant company were immediately informed of the mistake, and satisfied themselves that the actual date of the birth of the assured was March 6, 1844; but notwithstanding this information they accepted two further premiums, namely: on March 1, 1898, and March 1, 1899, respectively.

On August 4, 1899, the secretary of the defendant company wrote to the plaintiff's solicitor informing him of the mistake in the age of the assured, and that the premium for her correct age was 135*l.* 6*s.* 8*d.* instead of 112*l.* 16*s.* 8*d.*, and suggesting that the plaintiff should pay the yearly difference of 22*l.* 10*s.* on the previous twelve years with compound interest at 5 per cent., and should in future pay the larger premium.

This was the first intimation that the plaintiff received of the mistake. The plaintiff declined to accede to these terms, and tendered to the defendant company the annual premium of 112*l.* 16*s.* 8*d.* for each successive year down to and including March 1, 1904; but the defendant company refused to accept these premiums, and alleged that the policy was void and that the premiums were forfeited. The assured attained the age of sixty years on March 6, 1904, and was still living. The plaintiff alleged that the defendant company, by accepting the premiums in 1898 and 1899, had elected to affirm the policy.

P. O. Lawrence, K.C., and *W. M. Cann*, for the plaintiff. 1. The defendants cannot avoid this policy and forfeit the premiums upon the ground of the innocent misrepresentation contained in the proposal. The declaration annexed to the

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proposal provides that the policy shall be void and the premiums forfeited if it shall thereafter appear that the person making the proposal has made any untrue statement therein; but this declaration is recited in the policy and must be read with it, and the policy contains a proviso that it is only to be avoided by a wilful misrepresentation. Reading these two instruments together, the result is that the policy cannot be avoided unless the false statement complained of is designedly untrue: *Fowkes* v. *Manchester and London Life Assurance and Loan Association.* (1)

2. Assuming that the defendants had power to avoid the policy, by accepting two premiums after full knowledge of the facts they have elected to affirm it, and are precluded from insisting upon the forfeiture: *Armstrong* v. *Turquand* (2); *Wing* v. *Harvey.* (3)

Stewart-Smith, K.C., and *Blaiklock* for the defendants. The defendants do not insist upon their right as against the present plaintiff to avoid the policy, but they wish to carry it out according to what they say are its true terms. The assured has contracted on the basis of her age being forty-one, and she cannot now be heard to say that that age is incorrectly stated. She has agreed that the proposal and the declaration shall be the basis of the contract. The effect of that is that she has contracted that the date of her birth was March 6, 1847, and the defendants are only liable to pay on the sixtieth anniversary of that day.

[KEKEWICH J. You say by your policy that you do not admit that fact.]

The defendants merely reserve to themselves the right to call further evidence as to the lady's age; but that is a reservation for their benefit and they can waive it. If this is the correct view of the contract, it is immaterial whether the statement as to age was true or false, innocent or fraudulent. The policy contemplated the payment of twenty premiums; but the plaintiff is seeking to vary the contract by saying that the policy moneys are to become payable on the payment of seventeen premiums. There is no evidence of any such

(1) 3 B. & S. 917. (2) (1858) 9 Ir. C. L. Rep. 32.
(3) (1854) 5 D. M. & G. 265.

variation of the contract. The plaintiff is also precluded on the ground of estoppel.

H. T. Method held a watching brief for an interested party.

KEKEWICH J. I was troubled throughout the greater part of the argument with a doubt whether, having regard to the terms of the declaration annexed to the proposal, the company had not a right to avoid the policy and forfeit the premiums on the ground of the innocent misrepresentation contained in the proposal, notwithstanding that there was in the policy a proviso which contemplated an avoidance only if the policy had been obtained by wilful misrepresentation; but that doubt has been entirely removed by *Fowkes* v. *Manchester and London Life Assurance and Loan Association.* (1) The key to that case is that this proviso must be read with reference both to the statements in the policy itself and to the declaration, which, in one form or another, is always added to the proposal, and which is read into the policy. That being so, the defendants cannot avoid the policy and forfeit the premiums on the ground of a misrepresentation which is admitted not to have been wilful.

They might have said that the policy was granted on the basis of the assured being at the date of the proposal forty-one next birthday, and that, as that fact was not admitted, and it was now proved that she was not forty-one but forty-four next birthday, the assured, or her assignee, could not recover on the footing of her being forty-one. That they had to consider in 1897, when the mistake was discovered. It seems to me that they might then, if they had thought fit, with propriety have said, "We will return the premiums hitherto received to the proper person to receive them, and we will receive no more unless you wish to make a new contract." On the other hand, it was open to them to treat the policy as still subsisting and to accept the premiums on the old footing. It was a pure matter of business for the directors to say which of these two courses they would adopt. They elected to adopt the latter. They accepted two premiums after full

(1) 3 B. & S. 917.

KEKEWICH J. 1905 HEMMINGS v. SCEPTRE LIFE ASSOCIATION, LIMITED.

knowledge of the facts, and they now admit, as against the present plaintiff, that it is impossible for them to say that they did not affirm the policy as it stood. But then they say, "We are perfectly willing to pay, but we will pay when the lady attains sixty years according to the policy"; and they suggest that if they are made to pay when the lady actually attains sixty years it is making a new contract. It seems to me that it is the defendants who are asking to make a new contract. They say in their policy that they will pay immediately after satisfactory proof has been given to the directors of her having attained the age of sixty years, and it is impossible, as it seems to me, for any one to contend now that that means the time when she attains sixty years on the assumption that she was forty-one at the date of the proposal; it means the time when she actually attains sixty years. That is one of the very things which they must have considered when they decided the question whether they should allow the policy to remain on foot or not. As I pointed out to the counsel for the defendants, it matters not in the least to them whether they had a larger premium on the footing of the lady being the age she was, or the same premium to endure till she was sixty years of age according to the date of birth fixed in the proposal. In one way or another, no doubt, they were fairly entitled to a larger premium, but at the risk of avoiding the policy and returning the premiums. That would have been a new contract; it was introducing a new feature, and, of course, there was a doubt whether the assured or her assignee would continue the policy on the new footing. It was a business matter, and the defendants must be taken to have elected to keep the policy on foot as it stood and to pay when the lady attained the age of sixty years. I do not think there is really any room for doubt that the defendants are bound to pay the whole sum assured with the bonuses; and those bonuses will be calculated on the footing of the premiums being paid which were not paid, but were tendered, but which, of course, must be set off.

Solicitors: *G. A. Martin; May, Sykes & Co.; Taylor, Son & Humbert.*

H. B. H.

In re BOWLES. PAGE *v.* PAGE.

FARWELL J.

1905 ~ *Jan.* 12.

[1904 B. 3805.]

Settlement—Construction—"Trusts aforesaid"—Life Interest to Unmarried Niece with Reversion to Children—Power to appoint Life Interest to surviving Husband—Gifts over in Default of Children—Remoteness—Independent alternative Trusts—Validity of ultimate Trusts.

A testatrix, after settling a sum of money upon trusts for M. (a married niece) for life with power to appoint the income to any husband who might survive her for his life, with remainder to her children, if any, at twenty-one, settled three other sums of money upon such trusts and with such powers in favour of E., B., and J. (three unmarried nieces) and their respective husbands and children, if any, as should correspond with the preceding trusts and powers in favour of M. and her husband and children, if any. And the testatrix directed that, in case none of her said nieces should have any child who should become entitled to the said principal sums under "the trusts aforesaid," then all the said principal sums should, "subject to the preceding trusts," be held in trust for a class of persons, ascertained within due limits, in such shares, &c., as the last survivor of the four nieces should by will appoint. M. died without having had a child, and E., B., and J. all died unmarried; and B., the last survivor of them, by her will executed the power in favour of the class mentioned in the ultimate trust. On the death of B., the question arose whether the ultimate trust or gift was not void for remoteness on the ground that, if the power to appoint to husbands had been exercised, the period for ascertaining the class in the ultimate gift might have infringed the rule against perpetuities, because the husbands need not necessarily have been born in the lifetime of the settlor:—

Held, that the words "the trusts aforesaid" in the ultimate gift were not restricted to the previous trusts actually declared, but would include a trust created by the exercise of the power to appoint to husbands:

But, *held*, that it was a case of alternative independent gifts within the principle of *Monypenny* v. *Dering*, (1852) 2 D. M. & G. 145, and *Longhead* v. *Phelps*, (1770) 2 W. Bl. 704; and that, inasmuch as the power in favour of husbands was never exercised, the ultimate gift in the events which had happened was valid, and therefore the appointment made by B. was good.

ADJOURNED SUMMONS.

Mary Bowles, spinster, by her will dated July 3, 1861, after certain specific bequests, gave and bequeathed all the residue of her real and personal estate equally between the children of

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her late sister Elizabeth Page who might be living at her (the testatrix's) death; and she appointed Robert Page and her nephew, Thomas Douglas Page, executors of her will.

The testatrix made a codicil dated February 13, 1863, to her said will, and thereby, after revoking some of the specific bequests in her will, she directed her executors to stand possessed of a sum of 4200*l.* upon trust, as to 1200*l.* part thereof, to invest as therein mentioned, and to pay the annual income thereof to her niece Mary Rowden for life for her separate use. "And I empower my said niece to appoint all or any part of the said income to any husband who may survive her for any period determinable on or before his death. And subject to the trusts aforesaid the principal of the said sum of 1200*l.* shall be held upon trust for the child or children equally of my said niece who either before or after the determination of the previous trusts shall respectively attain the age of twenty-one years. And I direct my executors to stand possessed of three several sums of 1000*l.*, constituting together the remainder of the said sum of 4200*l.*, upon such trusts and with such powers in favour of my respective nieces Eliza Page, Blanche Page and Jane Page and their husbands and child and children respectively, if any, as shall correspond with the preceding trusts and powers in favour of my said niece Mary Rowden and her husband and child and children, if any. And in case either or any of my said four nieces shall die without leaving either husband or children who shall take an interest in the legacies aforesaid, I empower each such niece to appoint by her will all or any part of the income both original and accruing to which she shall herself be entitled as aforesaid unto or amongst any one or more of her sisters who shall survive her and shall not have been married for the life or respective lives of such last-mentioned sister or sisters either contemporaneously or in succession. And subject to such powers of appointment the principal sum or sums respectively producing the income so received by the niece or respective nieces so dying without leaving either husbands or children as aforesaid shall be added to the other or the others equally of the sums hereinbefore bequeathed and be subject to the trusts and

powers hereinbefore expressed or referred to concerning the sum or sums to which the same shall be added. And in case neither of my said nieces shall have any child who shall become entitled to the said principal sums under the trusts aforesaid then all the same principal sums shall, subject to the preceding trusts, be held in trust for such of my nephews, sons of my late sister Elizabeth Page, as shall be living at the time of the determination of the trusts aforesaid or the issue then living of any of my said nephews who may be then dead leaving issue in such proportions at such times and in such manner as the last surviving of my said four nieces may by her last will appoint. And in default of appointment the said principal sums shall be divisible amongst the next of kin (exclusive of a husband) of such last surviving niece living at the time of the determination of the previous trusts in a course of distribution according to the statutes."

The testatrix died in January, 1868, and her said will and codicil were duly proved by the said Thomas Douglas Page alone. The said Robert Page died in 1870.

Elizabeth Page, the deceased sister of the said testatrix, had nine children, of whom seven were living at the death of the said testatrix—namely, the plaintiff George Hyde Page, the said four nieces named in the codicil, and Robert Hyde Page and the said Thomas Douglas Page.

Robert Hyde Page died in April, 1880, leaving a son, the defendant Robert Henry Page, and several other children.

Thomas Douglas Page died in September, 1880, leaving two daughters only, the defendants Albinia Page and Margaret Page.

Mary Rowden, the married niece named in the codicil, died in December, 1868, without having had any issue, and leaving her husband her surviving. She did not exercise the power of appointment in favour of a husband given to her by the said codicil.

Eliza Page, Blanche Page, and Jane Page, the three other nieces named in the said codicil, all died unmarried. Blanche Page, the last survivor of them, died in May, 1903, having by her last will dated February 11, 1899, appointed and directed

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the trustees or trustee for the time being of the said will and codicil of the said Mary Bowles to hold the said sum of 4200*l.* and the investments representing the same upon trust for her brother, the plaintiff George Hyde Page, during his life, and after his death in trust for her nephew, the defendant Robert Henry Page, absolutely.

By a deed dated May 16, 1899, the defendant Robert Henry Page had mortgaged all the share and interest to which he then was or might thereafter by any means whatsoever become entitled (whether by virtue or in default of any appointment made or to be made by the said Blanche Page under any powers given to her by the said codicil) in the said sum of 4200*l.* to the defendants, the Legal and General Life Assurance Society.

The next of kin of Blanche Page living at her death were the defendants Albinia Page and Margaret Page and several other persons.

After the death of Blanche Page the question was raised as to whether all or any of the ultimate trusts by the said codicil declared concerning the said sum of 4200*l.* upon the failure of issue of the said four nieces were not void for remoteness, and this action was brought to determine the question.

W. S. Eastwood, for the plaintiff, who was also the acting trustee of the will and codicil of Mary Bowles.

The defendant Robert Henry Page did not appear.

Upjohn, K.C., and *T. L. Wilkinson*, for the defendants, the Legal and General Life Assurance Society. The question is whether the ascertainment of the class of objects to take under the power that has been exercised is postponed to a period too remote. The question turns on the construction to be placed on the power to appoint to husbands. Subject to that question, the appointment that has been made is clearly good. The question then is, whether the power to appoint to husbands is, in its inception, bad. It is conceded that if the codicil had contained a trust for husbands for life, following the trust for nieces for life, the ultimate trusts would have been bad, because the husbands might not have been born in the life-time of the testatrix, and therefore the ascertainment of the

class to take might have been postponed to a period beyond due limits. But, as Lord Selborne points out in *Pearks* v. *Moseley* (1), the Court does not import the law of remoteness into the construction of a will, but construes the will, in the first instance, as though there were no such law, and then, if the limitations or trusts are found to infringe the rule, the law applies. Here the power to appoint to husbands was never exercised, and it is submitted that the words "the trusts aforesaid" in the ultimate limitations mean "the trusts hereinbefore actually declared," and not what might have become trusts if the power had been exercised. There is no "trust aforesaid" which infringes the rule against perpetuities, and therefore the ultimate limitations are valid. There is no authority directly in point.

Davenport, for the defendants Albinia and Margaret Page. If the ultimate limitations are valid, we do not take this fund, because the appointment that has been made is good. If they are void for remoteness, again we do not take the fund, because it passes under the residuary bequest in the will.

J. K. Young, for parties claiming under the residuary bequest in the will. The words "trusts aforesaid" are, on the true construction of the codicil, clearly used as including this particular power. The Court must have regard to possible and not merely actual events. If the power had been exercised, there would have been a trust for husbands which would have been one of the "trusts aforesaid." In the next place, it is unquestionable that if a life interest had in express terms been given to husbands, instead of a power to appoint life interests to them, a case of perpetuity would have arisen. The question therefore is, whether the fact that there was only a power makes any difference. It is submitted that it does not. The test is whether a perpetuity might arise, not whether it did. Applying that test, if the power had been exercised there might have been a perpetuity. A gift or power to appoint, although within the limits, may be so connected with a previous power, which is or may be void, that such first-mentioned gift or power is bad: *Webb* v. *Sadler*. (2) Here

(1) (1880) 5 App. Cas. 714. (2) (1873) L. R. 8 Ch. 419, 426.

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the ultimate gifts can only take effect on the determination of a possible prior life interest which might not determine within proper limits. Therefore, the ultimate gifts are void and the fund falls into residue.

[FARWELL J. Cannot the limitations in the codicil be read as alternative independent gifts? One alternative might cause perpetuity. The other, which has happened, does not.]

Such a construction is not in accordance with the language used by this testatrix. It would in effect be splitting a contingency into two separate events. This cannot be done for a testator who has not done so himself: *Hancock* v. *Watson*. (1)

Upjohn, K.C., in reply.

FARWELL J. The question in this case is whether the ultimate gift, having regard to a power of appointment, is or is not void for perpetuity. There is in the first instance a limitation, putting it quite shortly, to a married niece and her children, if any, and then there are limitations to three unmarried nieces and their children, with a power for the nieces to appoint to any husband whom they may marry, and who may survive them, for a life interest, or any less interest. Those husbands, of course, would not necessarily be born in the testatrix's lifetime. If, therefore, there had been, not a power to appoint to such husbands, but in each case an actual life interest given to such husbands, and the class of children to take was not to be ascertained until the death of the survivor of such niece and her husband, the gift to the class would be void for perpetuity, because the class would not be necessarily ascertainable within a life or lives in being and twenty-one years afterwards. In my opinion in the present case, if the power had been in fact exercised in favour of any such husband, the same result would have followed; I do not see my way to adopt the rather forced construction that Mr. Upjohn invited me to put upon the words "trusts aforesaid" in the ultimate gifts. I think Lord Hardwicke's words in *Duke of Marlborough* v. *Lord Godolphin* (2) apply: "The

(1) [1902] A. C. 14. (2) (1750) 2 Ves. Sen. 61, 78.

meaning that the persons must take under the power" —that is, as if their names had been inserted in the power— "is, that they shall take in the same manner as if the power and instrument executing the power had been incorporated in one instrument; then they shall take, as if all, that was in the instrument executing, had been expressed in that giving the power." I do not see my way to saying that, if the power had been exercised, the appointee would not have become a cestui que trust so as to be able to predicate successfully that he claimed under "the trusts aforesaid." But inasmuch as the power never was exercised, and having regard to what a power is, and what the nature of the interest created under it is, I am of opinion that this case falls within the class of cases of alternative independent gifts. The person who takes under the exercise of the power takes an executory interest in an event which may or may not happen; the testatrix has given the property to a class of persons ascertained within due limits, but she has enabled the life tenants named in her will to alter that limitation by the insertion of a life interest to a person who might be born after her death, and thus alter the period for ascertaining the class to the date of the death of the survivor of that person and herself. Those limitations are in my opinion alternative independent gifts within the principle of *Monypenny* v. *Dering* (1) and *Longhead* v. *Phelps*. (2) The result is that in this case I am able to give effect to the ultimate gift without in any way departing from the stringency of any of the cases which say that effect must be given to the rule against perpetuity whatever the consequence may be. I hold that the ulterior limitations or trusts are good, and that the appointment made by the will of Blanche Page in favour of the defendant Robert Henry Page is valid.

Solicitors: *Routh, Stacey & Castle, for Adam, Thring & Sheldon, Bath; Lawrence, Graham & Co.; Cunliffes & Davenport.*

(1) 2 D. M. & G. 145. (2) 2 W. Bl. 704.

H. L. F.

FARWELL J.
1905
Jan. 13, 18.

In re WILLATTS.
WILLATTS *v.* ARTLEY.

[1904 W. 3652.]

Will—Construction—Realty—"What is left"—Life Estate by Implication—Intestacy—Devise after Death of A. to two of several Co-heirs.

The rule that a devise of realty, after the death of A., to the heir-at-law of the testator, gives A. a life estate by necessary implication, does not apply when the devise is, after the death of A., to one or more of several co-heirs. In such a case there is an intestacy during the life of A.

Hutton v. *Simpson*, (1716) 2 Vern. 722; S. C. Gilb. Eq. Rep. 115, 120, and Prec. Ch. 439, 452, discussed and explained.

A testator appointed his wife his executor with power to sell all his property and land, and "at her death what is left to be divided between" his two daughters:—

Held, that the words "what is left" meant the "net residue" of the estate after payment of debts and costs of realization, and did not give the wife a life or any other interest in the testator's estate.

ADJOURNED SUMMONS.

William Willatts by his last will, dated May 17, 1903, after appointing his wife (the plaintiff) Emma Willatts and (the defendant) Constance Artley to be executrixes of his said will, and after directing the payment of his debts and funeral and testamentary expenses, disposed of his property as follows:—

"I give and bequeath to my wife Emma Willatts of Rose Cottage Coldham in the parish of Thakenham in the county of Sussex all my household effects absolutely, and at my death the said Emma Willatts to have power to sell all property and land belonging to me and at her death what is left to be divided between Eliza and Emma Willatts my two daughters by my second wife so that no husband they may marry shall have power or control over the same."

The testator died on August 23, 1903. His property consisted of realty and personalty. His realty was worth about 900*l.*, and his personalty about 100*l.*

The testator was twice married. By his first wife he had several children, all of whom died in infancy except three daughters, all of whom married. Two of them survived him,

but the third daughter died in his lifetime leaving a son, now living, and other children. By his second wife, the plaintiff Emma Willatts, he had the two daughters named in his will, who also survived him; so that his five daughters were his co-heiresses-at-law, the deceased daughter being represented by her son.

This summons was taken out to determine whether the plaintiff took the whole of the testator's property, or only a life estate by implication.

Lyttelton Chubb, for the plaintiff. First, on the true construction of the will, the plaintiff has an absolute power of disposition over all the property of the testator during her life, and is entitled during her life to expend such portion of the capital as she may think fit, and the two daughters named in the will are only entitled to such part of the said capital as may be left at the death of the plaintiff. But if the words "what is left" mean the net residue of the estate after costs of realization, then it is submitted that the plaintiff takes a life estate by implication, because the two residuary legatees are two of the co-heirs of the testator. There is no authority directly in point. All the co-heirs of a testator together make but one heir: Co. Litt. 163a. It is settled that a devise to the heir-at-law after the death of A. gives A. a life estate by implication: *Gardner* v. *Sheldon* (1); Tudor's L. C. on Real Property, 4th ed. p. 398; and it is submitted that the same principle applies where the gift is after the death of A. to one or more of several co-heirs. In Theobald on Wills, 5th ed. p. 643, it is stated that in such a case A. takes a life estate. The fourth resolution in *Hutton* v. *Simpson* (2) supports this view; but that dictum does not appear in the report of the same case in Prec. Ch. 439, and in Gilb. Eq. Rep. 115. On principle it is not unreasonable to imply a life estate. *Ralph* v. *Carrick* (3) may be cited against me, but it is distinguishable. The testator there had given an annuity to his wife, and, moreover, the gift was to one of the co-heirs and others after the death of the wife.

C. Shebbeare, for the two daughters named in the will. We

(1) (1670) Vaugh. 259. (2) 2 Vern. 722, 723.
(3) (1879) 11 Ch. D. 873.

FARWELL J. 1905 WILLATTS, *In re.* WILLATTS *v.* ARTLEY.

contend that the plaintiff does not take an absolute interest in the testator's estate. The words "what is left" mean the net residue after cost of realization. But it is to our interest, and we support the contention that she takes a life estate by implication in the real estate: *Willis* v. *Lucas* (1); *Rex* v. *Ringstead* (*Inhabitants*) (2); *Blackwell* v. *Bull.* (3)

J. W. Galbraith, for the daughters by the first marriage. The plaintiff takes no interest whatever in the testator's estate. As to a life estate by implication it is settled, as regards personalty, that a gift after the death of A. to some of the next of kin does not give A. a life interest in the personalty: *Woodhouse* v. *Spurgeon* (4); *In re Springfield.* (5) It is submitted that the same rule applies in realty, and that there can be no life estate by implication unless the gift is to all the co-heirs after the death of A. In Hawkins on Wills, p. 179, it is said that the rule as to life estate by implication does not apply where the gift over is to one of several co-heirs, or to the heir jointly with other persons; and the same view is taken in Jarman on Wills, 5th ed. p. 509. There is therefore an intestacy during the life of the plaintiff.

Lyttelton Chubb, in reply.

Cur. adv. vult.

Jan. 18. FARWELL J. delivered the following written judgment:—The testator, William Willatts, made his will on May 17, 1903, and died on August 23, 1903, leaving a widow and four daughters and the children of a deceased daughter surviving him. Two of such daughters are the infant defendants named in the will, and the defendant Emma Bennett is another of the daughters. These four daughters and the son of the deceased daughter take as co-parceners any real estate of the testator that may be undisposed of by his will. He died possessed of two freehold houses worth about 900*l.*, certain household furniture, and other personal estate worth about 100*l.* [His Lordship then read the will, and continued:—] I am unable to find any express words of gift to the widow of any part of

(1) (1718) 1 P. Wms. 472, 474.
(2) (1829) 9 B. & C. 218, 228; 32 R. R. 648.
(3) (1836) 1 Keen, 176; 44 R. R. 52.
(4) (1883) 49 L. T. 97.
(5) [1894] 3 Ch. 603.

the real estate. The words "what is left" appear to mean "the net residue" after payment of debts and costs of realization, and I cannot extract from them any gift of a life or other interest to the widow. If I were at liberty to guess, I might suppose that he meant to give the widow power to apply the corpus to such an extent as she required for her own benefit; but he has not said so, and I cannot supply the necessary words.

The will, therefore, raises the neat point whether a gift of real estate after the death of A. to persons who are some but not all of the co-heiresses of the testator amounts to a gift of a life interest to A. by necessary implication. It has been settled since the case in the Year Books, 13 Hen. 7 (I cite it from *Horton* v. *Horton*) (1), that "a devise to his heir of his land after the death of his feme is a good devise by implication to the feme: for it appears he intended his heir should not have it until the death of his feme: and none other can have it besides the feme. And therefore it is a good devise to the feme by implication." It is equally well settled that a devise to a person other than the heir after the death of A. gives no estate to A., because the land can descend to the heir in the meantime, and the testator has expressed no intention that it should not; and the heir is not to be disinherited without necessary implication. It is also well settled that a life estate will not be implied from a gift on the death of A. to the testator's heir together with another or others: *Ralph* v. *Carrick*. (2) The meaning of "necessary implication" is well stated in the judgment of Vaughan C.J. in *Gardner* v. *Sheldon*. (3) He says: "In a will estates are often given by implication. But I shall take this difference concerning estates that pass by implication, though it be by will. An estate given by implication of a will, if it be to the disinheriting of the heir-at-law, is not good, if such implication be only constructive and possible, but not a necessary implication. I mean by a possible implication, when it may be intended that the testator did purpose, and had an intention to devise his land to A.; but it may also be as reasonably intended, that he

(1) (1604) Cro. Jac. 74, 75. (2) 11 Ch. D. 873. (3) Vaugh. 259, 262.

FARWELL J. 1905 WILLATTS, *In re.* WILLATTS *v.* ARTLEY.

had no such purpose or intention to devise it to A. But I call that a devise by necessary implication to A. when A. must have the thing devised, or none else can have it. And therefore if the implication be only possible, and not necessary, the testator's intent ought not to be construed to disinherit the heir, in thwarting the dispose which the law makes of the land, leaving it to descend, where the intention of the testator is not apparently, and not ambiguously to the contrary." It has been pointed out in Jarman on Wills, 5th ed. vol. i. p. 509, that there seems not to be the same absurdity in supposing a testator to give to one of his co-heiresses after the death of another person, intending it to descend to all in the meantime, as when the devisee is the same and the only individual upon whom the intermediate interest could have descended. But it is said that there is authority to the contrary, and *Hutton* v. *Simpson* (1) is cited in Theobald on Wills as an authority for the proposition that a devise to one of several co-heiresses after the death of A. gives A. a life interest. The fourth resolution in that case is as follows (2): "That a devise to Bridget after the death of his wife, although Bridget was but one of the two co-heirs, would give an estate for life to the wife by implication: but that would not concern this case; for the words in the will after the death of the wife, related only to her jointure-lands devised to Bridget." The case in Vernon is also reported in Prec. Ch. pp. 439, 452, and in Gilb. Eq. Rep. pp. 115, 120, and it is plain from those reports that no such point was in fact decided. The reports are identical, and are as follows: "As to the first point, the Court seemed pretty clear that the wife took no estate for life by implication, because the implication which shall disinherit an heir-at-law must be necessary; and here was no necessary implication, though the daughters were heirs, because it may be intended to extend only to those lands which were before expressly devised to the wife for life, so that they should not have them till after her death; but for the others, they should get them immediately, and therefore the will shall be taken distributively." And later on the Lord Chancellor says: "As to the other points, he was of opinion

(1) 2 Vern. 722. (2) 2 Vern. 723.

that the wife took no estate for life by implication, for he had, in the foregoing part of his will, devised several lands to her for life for her jointure, and in full of all claims and demands whatsoever, both in law and equity; and when he after devises, after the death of his wife, all his lands, tenements, rents, reversions, profits, and hereditaments whatsoever (not before disposed of) to his daughters, &c., this shall be taken distributively, that is to say, all the lands which he had before given his wife, to go to his daughter after her death, and all other his lands, not before devised, to his daughter immediately; and to make any other construction on these general words would be absurd, when he had before, in such full and express words, provided for his wife besides; that in no case an heir-at-law is to be disinherited by implication, unless it be necessary, which in this case it is not." This has been already pointed out by Sir William Grant in *Dyer* v. *Dyer* (1); and by Bayley J. in *Rex* v. *Ringstead* (*Inhabitants*) (2); and by Brett L.J. in *Ralph* v. *Carrick*. (3) It must be remembered that Mr. Vernon, who was a most learned lawyer, did not publish his own reports, and is believed to have made the notes, which were published after his death, as memoranda merely for his own use. The fourth resolution, regarded as a mere note, might well be read as meaning that even if the devise would give an estate by implication, that would not concern the case. I am, therefore, of opinion that *Hutton* v. *Simpson* (4) is not a decision, and I do not think that it can fairly be said to be even a dictum, on the point. Then it is said that Lord Parker L.C. expressed an opinion in favour of implying a life interest in *Willis* v. *Lucas*. (5) I have compared P. Williams' report of this case with that of the same case in 10 Mod. p. 416, and I think it is plain that the statement at p. 475 of 1 P. Williams is the argument of counsel and not the opinion of the Lord Chancellor; and I read P. Williams as stating that the Lord Chancellor said nothing as to this. I have considered the argument urged for the wife in that case. It was founded on

(1) (1816) 19 Ves. 612; S.C. 1 Mer. 414.
(2) 9 B. & C. 218, 228; 32 R. R. 648.
(3) 11 Ch. D. 877.
(4) 2 Vern. 722.
(5) 1 P. Wms. 472.

FARWELL J. 1905 WILLATTS, *In re.* WILLATTS *v.* ARTLEY.

the proposition of law stated by Littleton (1), that daughters inheriting "be but one heir to their ancestor," in accordance with which it was held in *Reading* v. *Royston* (2) that where a man devised his land to the son of one of his two daughters and co-heiresses, the son took the entirety as devisee, and could not take one moiety by his superior title of co-heir. The decision is thus stated at p. 242: "Where a devise to an heir gives the same estate which would descend, the devise is unnecessary, and nihil operatur; it has no effect, and therefore it is void. But here is not a devise to an heir; both co-parceners make the heir, and the one is not an heir without the other; and supposing the devise void as to one moiety, the other moiety must descend to both. But the grandson must take by the devise in this case, because nothing can descend to him ut uni cohæredi." But "though parceners before partition have one entire freehold in respect of any stranger's præcipe, yet to many purposes among themselves they have in judgment of law several freeholds; for each parcener, where there are two of them, has really but a title to a moiety of the land, and is not, as in a case of joint tenancy, seized per my et per tout; the same law holds where there are more parceners, for in such case each has but a title, in judgment of law, to her proportion; therefore parceners may enfeoff each other of their share, as well as convey it to strangers": Bac. Abr. vol. ii. Co-parceners, B. p. 177. (See also Year Book, 2 Edw. 2, 44 B.; S. C. 103 a; Anon. Selden Society, Year Books, vol. ii. p. 5; and Co. Litt. 164 a.) Although the legal estate may descend on the co-heiresses as one heir, their beneficial interests both legal and equitable are several, and there is no more inconsistency or absurdity in the devise to some of them after the death of A. than in a devise to the heir-at-law and another after such death. I cannot persuade myself that it is necessary, in order to answer the intention of this testator and to avoid an obvious absurdity in his will, to hold that he has given a life estate by implication. I should be disregarding the lucid and conclusive reasoning of Cotton L.J. in *Ralph* v. *Carrick* (3) if I were so to hold. He says: "That being so, does this case come within the principle of the rule applicable to a gift to the heir-at-law after the death

(1) Co. Litt. 163 a. (2) (1702) 1 Salk. 242. (3) 11 Ch. D. 873, 879–80.

of A., or within the principle of the rule applicable to a gift to a stranger after the death of A.? In my opinion it comes within the latter, because, although the heir-at-law is one of the persons to whom the gift is made, it is not necessary to give to anybody else in order to postpone the interest he is to take under the will, as he does not under the gift take that which, independently of gift, would come to him. Independently of gift he takes the whole real estate, but under that gift he takes only a share in it. So that, both as regards the interest given to the stranger and as regards the modification of the interest which the heir-at-law takes, it cannot be said that the gift after the death of A. is inoperative, unless you treat it as a postponement of the gift and give a life interest to A." I have already pointed out that there is no express decision on the point; nor can it be said that there is any consensus of professional opinion in favour of implying a life estate among text-writers. The statement in Jarman on Wills, which has been repeated by all his editors, is found at least as early as 1827 in the 3rd edition of Powell on Devises; and Mr. Vaughan Hawkins in 1863 expresses the opinion that in such a case a life estate cannot be implied, and refers to a dictum of Lord Romilly to that effect in *Barnet* v. *Barnet*. (1) I have come to this conclusion with some regret; but, as Sir R. P. Arden said more than a century ago in a somewhat similar case of *Upton* v. *Lord Ferrers* (2), "a judge in equity is not more at liberty to raise inferences than a Court of law. He must not say what he supposes the testator meant, but what the testator has said," notwithstanding that "a private man would say undoubtedly, that he must have intended, his wife should take for her life." As to the personalty other than the furniture, the case is unarguable on the authorities. I must, therefore, declare that the testator died intestate during the life of his widow as to such personalty and as to all his real estate.

Solicitors: *W. W. Young, Son & Ward; G. A. Double.*

(1) (1861) 29 Beav. 239. (2) (1801) 5 Ves. 801, 805; 5 R. R. 167.

H. L. F.

FARWELL J.

1905

Feb. 9, 10.

In re GENT AND EASON'S CONTRACT.

[1904 G. 2615.]

Vendor and Purchaser—Title—Will—Investment Clause—Construction—Power to invest in the Purchase of Real Estate—Power to transpose and vary "Securities"—Implied Power to resell purchased Real Estate.

A testator, who died in 1895, by his will devised and bequeathed his real estate and the residue of his personal estate upon trusts for his wife and children; and the testator, after giving his trustees a discretionary power of sale over his real estate, authorized them to invest any trust moneys in their hands "in the purchase or upon mortgage of freehold or leasehold properties in England . . . . or in or upon the preferential stocks" of certain railway companies, "or in any other investment in or upon which trustees are authorized by law to invest trust funds, with full power to vary and transpose such securities for others of the description hereinbefore authorized." The will contained no express trust or power for reconversion of purchased real estate. In 1896 the trustees out of trust moneys in their hands purchased real estate, and in 1903 contracted to resell the same. The purchaser objected that the trustees had no power under the will to resell the purchased real estate:—

Held, following *In re Rayner*, [1904] 1 Ch. 177, that the testator had used the word "securities" in its wider sense as a synonym for "investments"; and that the power to transpose and vary securities, so read, enabled the trustees to resell the purchased real estate and to give a good discharge for the purchase-money.

ADJOURNED SUMMONS.

William Gent by his will dated February 15, 1893, after giving some specific and pecuniary legacies, devised and bequeathed all his real estate and the residue of his personal estate to W. H. Gent, H. Barker, and W. S. Cottrell upon trusts to pay certain specified annuities to his wife and daughters during their respective lives, and to pay the residue of the income of his residuary real and personal estate unto and equally between his said daughters. And after the death of his wife the testator directed his trustees to stand possessed of the sum of 6000*l.* for each of his daughters in manner therein mentioned, and to stand possessed of the remainder of his real and personal estate in trust for his sons and daughters in equal shares. And the will proceeded thus: "I authorize and

empower my said trustees or trustee to sell and absolutely dispose of all or any part of my real and personal estate of a saleable nature at such time or times and in such manner and form as they or he shall think beneficial. I authorize and empower my said trustees or trustee to lay out and invest the moneys coming to their or his hands under the trusts of this my will in the purchase or upon mortgage of freehold or leasehold properties in England or in or upon the Government stocks or funds or in or upon the debentures or preferential stock of the Great Western Railway Company the Midland Railway Company or the London and North Western Railway Company or in any other investment in or upon which trustees are for the time being authorized or empowered by law to invest trust funds with full power to vary and transpose such securities for other securities of any of the descriptions hereinbefore authorized." And the testator appointed his trustees to be the executors of his will.

The testator died in June, 1895.

In September, 1896, the trustees, "out of moneys coming to their hands under the trusts of the said will," purchased freehold ground-rents in London, and the same were conveyed to them in the usual way "upon the trusts and subject to the powers and provisions upon and subject to which the same premises ought to be held by virtue of the said will of the said William Gent deceased."

In May, 1904, the testator's wife died; and in October, 1904, the trustees put up the freehold ground-rents (along with other property) for sale by public auction subject to printed conditions of sale, one of which (No. 12) stated: "The vendors are selling as trustees of the will of the late William Gent, in consequence of the death of the testator's widow, and for the purpose of distributing his estate, and the beneficiaries under the said will shall not be required to concur in the sale, or to join in the conveyances to the respective purchasers."

The freehold-ground rents, which were lot 2 in the particulars, were not sold at the auction; but on November 15 the respondents, Messrs. Eason, entered into a written contract with the trustees to purchase lot 2, subject to the conditions

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of sale so far as the same were applicable to a sale by private treaty. On investigating the title the purchasers objected that the vendors had no power to sell real estate, purchased by them under the power in that behalf conferred on them by the will, and to give a good discharge for the purchase-money, and declined to complete without the concurrence of all the beneficiaries. The vendors insisting that they could sell under the power to vary and transpose securities, this summons was taken out by the purchasers under the Vendor and Purchaser Act, 1874, to determine the question.

H. Fellows, for the purchasers. If this will authorizes the vendors to sell this property, I am out of Court; but on the face of the will there is no power, express, implied, or constructive, that enables the vendors to resell purchased real estate. In the first place, there is no trust for conversion. The testator settles his real estate as real estate, and then gives his trustees a discretionary power of sale over his real estate. That power of course only applies to the real estate which the testator had at the time of his death. Then comes the investment clause, which authorizes the trustees to invest in the purchase of land or upon Government or railway stocks, or upon other investments allowed by law to trustees, with a power to vary and transpose such securities. Primâ facie, "land" is not a "security" within the usual meaning of that word, and it is submitted that purchased land is not a "security" within the meaning of this will.

[FARWELL J. The word "securities" is not a term of art. Has not this testator used it here as a synonym for "investments," which would include purchased land?—*In re Rayner*. (1)]

No question of conversion arose in that case, and the decision does not apply here. It would be carrying the doctrine of *In re Rayner* (1) very far to hold that a power to vary securities includes a power to resell purchased real estate. There is here no trust or power to reconvert purchased real estate. There is, in fact, no conversion at all. The testator's

(1) [1904] 1 Ch. 176, 189.

real estate goes as real estate, and purchased real estate goes with it as real estate.

[FARWELL J. In *Tait* v. *Lathbury* (1) it was held that a power to invest in real estate gave the trustees a power to resell purchased real estate.]

That case is clearly distinguishable. There was an express declaration that purchased land should be deemed personal estate for all purposes. There is no such declaration here.

[FARWELL J. referred to *In re Garnett Orme and Hargreaves' Contract.* (2)]

The decision there turned mainly on the Settled Land Act, 1882. It is not a very satisfactory case on the point now before the Court. Lastly, there is here no evidence of any necessity for the trustees to convert this real estate, and, on the whole, the title is too doubtful to force on a purchaser.

Upjohn, K.C., and *S. B. L. Druce*, for the vendors, were not called upon.

FARWELL J. The testator has authorized his trustees to lay out and invest the moneys coming to their hands under the trusts of his will in the purchase, or upon mortgage, of freehold or leasehold properties in England, or in or upon the Government stocks or funds, or in or upon debentures or preferential stock of the Great Western Railway Company, the Midland Railway Company, or the London and North Western Railway Company, or in or upon any other investments in or upon which trustees are for the time being authorized or empowered by law to invest trust funds, with full power to vary and transpose such securities for other securities of any of the descriptions hereinbefore authorized. Now the Court of Appeal in *In re Rayner* (3) had to consider the meaning of the word "securities" in an investment clause in a will, and Romer L.J. says (4): "The word is a flexible one, and I recognise that it is largely used in a wider or different sense, and in particular is widely used as a synonym for 'investments.'" Now it is quite plain to my mind that in

(1) (1865) L. R. 1 Eq. 174.
(2) (1883) 25 Ch. D. 595.
(3) [1904] 1 Ch. 176.
(4) Ibid. 189.

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the present case the testator has used the word "securities" as a synonym for "investments"; he authorizes his trustees to invest in preferential stock of three railway companies and speaks of other trustee investments, and then authorizes the variation of such securities for any of the securities before authorized. Railway preference stocks are not "securities" in the strict sense, but he treats throughout "investment" and "security" as interchangeable terms. It is clear, therefore, reading the word "securities" as synonymous with "investments," that there is here a trust to invest moneys in the purchase or mortgage of land, or in or upon the preference stock of railway companies, or in or upon any other investments allowed by law to trustees, with a power to vary and transpose such investments for other investments of a like nature; and I have no doubt that, under this power to vary and transpose "such securities," i.e., "investments," the trustees are authorized to resell real estate that they have purchased as an investment. I do not share Mr. Fellows' horror as a conveyancer that the will has not the usual trust for reconversion of purchased real estate. It is only reasonable to suppose that a testator would not authorize his trustees to convert his own real estate as they thought fit if he did not at the same time give them a like power to turn back into personalty that which was made realty by their act under the investment clause. There will be a declaration that the trustees have power to sell the purchased freeholds and to give a good discharge for the purchase-money. The purchasers must pay the costs of this summons.

Solicitors for purchasers: *Lattey & Hart.*

Solicitors for vendors: *Gamlen, Burdett & Gamlen,* for *Jobson & Marshall, Dudley.*

H. L. F.

In re NISBET AND POTTS' CONTRACT.

FARWELL J.

1905

Jan. 31; Feb. 1, 9.

[1904 N. 598.]

Vendor and Purchaser—Restrictive Covenants—Title by Possession—Notice—Acceptance of less than Forty Years' Title—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34.

P. sold land to N. under a contract dated in 1903, which shewed that one of P.'s predecessors in title had acquired a title by possession under the Statute of Limitations. An abstract was delivered which did not shew the existence of any restrictive covenants as to user. N. discovered aliunde that in 1872 the person then in possession of the land, and against whose heirs a title had been acquired by possession, had entered into covenants restricting building upon the land. The vendor had purchased in 1901, and had then accepted a title commencing in 1878. He had no actual notice of the covenants, but would have had notice if he had insisted on and obtained a forty years' title. The purchaser objected to the title on the ground that the land was bound by the covenants. The vendor answered that as he purchased without notice and the title was one by possession the land was not bound:—

Held, that a title acquired by adverse possession is not paramount to, and does not destroy, the equitable right of persons entitled to the benefit of prior restrictive covenants to enforce them against the land; that any purchaser taking less than a forty years' title is fixed with constructive notice of everything of which he would have received actual notice if he had insisted on a full title; and, therefore, the vendor in this case had notice of the covenants; and that a good title was not shewn.

The nature of the right to enforce restrictive covenants discussed.

ON January 1, 1903, F. V. Nisbet agreed to sell to S. L. Potts a piece of land at Leytonstone for 3200*l.*, under conditions which provided that the title should commence with a deed of August 11, 1890, and the purchaser should be deemed to have full notice of its contents.

An abstract was delivered on February 10, 1904. It commenced with the deed referred to in the conditions, which was a conveyance from Thomas Headde to S. C. Davis, Isaac Davis, and L. Levy as joint tenants in fee simple. The recitals, which were partly set out in the conditions, shewed that the property had formerly been in the possession of William Talbot Thomas Kidd, and that Thomas Headde had acquired a statutory title by the possession of the property by

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himself and his father for thirteen years after Kidd's death. The only other abstracted deeds were a conveyance by S. C. Davis of his share in the property to L. Levy and the conveyance to the vendor, which was dated November 29, 1901, and made by Isaac Davis and L. Levy. On the occasion of his purchase the vendor had had produced to him a statutory declaration of the possession of Thomas Headde and his father for thirteen years before August 11, 1890, and their successors in title since that date, without interruption or any acknowledgment of the title of any person claiming under Kidd.

The abstract did not shew the existence of any covenants restricting the user of the land, but the purchaser ascertained from other sources that there were covenants contained in a conveyance of the property to George Keates and Charles Hoar, dated November 9, 1867, which forbade the erection of any shops on the land, or the erection of any buildings whatever within thirty feet of the road. The purchaser then delivered requisitions, dated February 16, 1904, of which No. 11 was: "The property appears to be subject to restrictions which are fatal to the title." The restrictions were then stated, and the requisition proceeded: "How does the vendor reconcile this fact with the assurance made by his solicitors both before and after the contract that there were no building restrictions? Unless the purchaser is satisfied that these restrictions do not exist he will be compelled to rescind the contract." The vendor, on February 26, sent answers to the requisitions which were headed: "The purchaser having taken possession of the property and accepted the title, these requisitions are answered as a matter of courtesy and without prejudice to the vendor's rights." The answer to No. 11 was: "The vendor purchased without notice, and, having regard to this and the fact that the title is one by adverse possession, these covenants do not now bind the land." The vendor denied that any such assurance as was mentioned in the requisition was ever given.

In the interval between the delivery of the requisitions and that of the answers the purchaser received a letter from a solicitor on behalf of other freeholders on the estate threatening

proceedings for an injunction to restrain any breach of the covenants. He then ascertained that covenants similar to those contained in the deed of 1867 had been entered into by Kidd in the conveyance to him in 1872.

The vendor on his purchase had accepted a title commencing in 1878. He had no actual notice of the covenants, but would have obtained notice if he had insisted on a forty years' title.

This summons was taken out by the purchaser, asking for a declaration that the purchaser's objections to the title had not been sufficiently answered and a good title had not been shewn, or, alternatively, that the title shewn was not one which the purchaser ought to be compelled to accept; and for a return of the deposit.

A question was raised by the vendor whether the purchaser had not accepted the title by taking possession; but, as the evidence on this point was insufficient, it was agreed that the question of law should be argued, and, if necessary, the summons should stand over for further evidence.

Jessel, for the purchaser. The main question is whether the acquisition of a title under the Statute of Limitations relieves future purchasers of the land to which a title is so acquired from prior restrictive covenants of which they have notice. The purchaser contends that the statute does not give a release from such covenants; and if he is wrong on that point, still the title is too doubtful to be forced on a purchaser. The only section which can possibly give a release from the covenants is s. 34 of 3 & 4 Will. 4, c. 27 (1), which finally extinguishes the right in cases where the statute has taken away the remedy. But that section only applies to persons whose remedies are limited by s. 2, namely, persons entitled to make an entry or distress, or to bring an action or suit for the recovery of the land or rent. Persons entitled to enforce a restrictive

(1) Sect. 34: "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

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covenant under the doctrine of *Tulk* v. *Moxhay* (1) have no right to the recovery of the land; such covenants are only enforced by Courts of Equity as binding on the conscience of persons in possession of the land who have notice. The doctrine applies to persons with constructive notice, and any person who escapes actual notice, by accepting a less title than he is legally entitled to, will be fixed with constructive notice. The vendor had a right to a forty years' title: *Jacobs* v. *Revell* (2), and if he had insisted on it would have had notice. *Tichborne* v. *Weir* (3) is distinguishable. It only decided that a landlord could not sue a man who had acquired a title to a term of years by possession against the lessee for damages on the covenant to repair contained in the lease. It was admitted that the landlord could have re-entered during the term for breach of the covenant. The statute does not forbid the persons entitled to the benefit of restrictive covenants to enforce them. These covenants are binding on the conscience only, and have always been free from purely legal restrictions.

But, even if the Court should be of opinion that the covenant is not binding, the title is not one which the Court will force upon a purchaser: *In re Trustees of Hollis' Hospital and Hague's Contract* (4); Fry on Specific Performance, § 890, 3rd ed. p. 408.

Jenkins, *K.C.*, and *A. Romer Macklin*, for the vendor. The question is what is the foundation of the doctrine which makes these restrictive covenants in a sense run with the land. *Tulk* v. *Moxhay* (1) shews that it is founded in contract, and that it binds all who come into possession derivatively with notice of it. The rule is so stated by the Privy Council: *McLean* v. *McKay*. (5) You must find a derivative title from the person originally bound by the contract. The position of a man who acquires the legal estate without notice does not affect the present point. It is clear that a man claiming under a paramount title would not be bound, though the conveyance to him was subsequent to the covenant. The title acquired by

(1) (1848) 2 Ph. 774.
(2) [1900] 2 Ch. 858.
(3) (1892) 4 R. 26; 67 L. T. 735.
(4) [1899] 2 Ch. 540, 555.
(5) (1873) L. R. 5 P. C. 327, 336.

possession under the statute is in no way derived from the title of the former owner. It is paramount, and discharged from all obligations affecting the former title.

[FARWELL J. referred to *London and South Western Ry. Co.* v. *Gomm.* (1)]

The equity which the purchaser says binds the land is founded on contract. Bowen L.J.'s judgment in *Tichborne* v. *Weir* (2) shews that a title under the statute is free from all restrictions on the estates of former owners. The man who acquires title by possession has in effect an estate in fee created by the statute, though there are no words of creation in the statute.

There is no reason to fix the vendor with notice of these covenants. He purchased in 1901, and never in fact heard of the deed of 1872, which was then nineteen years old. The Court will not forbid any purchase to be made except under an open contract.

Jessel, in reply. It is quite clear that a purchaser who accepts less than a forty years' title is affected with notice of all covenants of which he would have had notice if he had insisted on a title for that period: *In re Cox and Neve's Contract.* (3) In *Mander* v. *Falcke* (4) the covenant was enforced against a mere occupier.

Clements v. *Welles* (5) shews that the covenants can be enforced against persons whose estate is not derivative from the covenantor.

In any case, a title which depends on a question whether the vendor or his predecessor had notice will not be forced on the purchaser: *In re Handman and Wilcox's Contract.* (6)

Cur. adv. vult.

Feb. 9. FARWELL J. By contract in writing dated January 1, 1903, the vendor, F. V. Nisbet, agreed to sell to the purchaser, S. L. Potts, a piece of land at Leytonstone for 3200*l.* The contract provided that the title should commence with a

(1) (1882) 20 Ch. D. 562.
(2) 4 R. 26; 67 L. T. 735.
(3) [1891] 2 Ch. 109.
(4) [1891] 2 Ch. 554.
(5) (1865) L. R. 1 Eq. 200.
(6) [1902] 1 Ch. 599.

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conveyance of August 11, 1890, "in which indenture it is stated that Thomas Headde and his father had at that date been in possession of the said property for thirteen years and upwards." For the purpose of the present argument it is admitted—(1.) that Thomas Headde had acquired a possessory title in 1890; (2.) that there is in existence a deed dated in 1872 containing restrictive covenants which affect the land contracted to be sold or a material part of it; and (3.) that neither the present vendor when he bought in 1901, nor the purchaser in 1890, made any inquiry into the title prior to 1878. Under these circumstances the vendor contends that the land is not subject to the restrictive covenants in his hands, on the ground that neither Headde, nor the purchaser from him in 1890, nor the present vendor, had any notice of the existence of these covenants, and that there is nothing, therefore, which will enable the Court to bind their consciences to give effect to them. It was argued that Headde was not bound—(1.) because he acquired title by possession under the statute and had nothing to do with the title of any one prior to him; and (2.) because s. 34 of the statute 3 & 4 Will. 4, c. 27, protected him, whether he had notice or not, and that if this was so, it was immaterial whether subsequent purchasers from him had notice or not; and, failing that, it was argued that the two subsequent purchasers were not bound unless they were affected with notice. It is necessary, therefore, to consider the exact nature of these restrictive covenants and the mode in which the burden created thereby is imposed on land.

Covenants restricting the enjoyment of land, except of course as between the contracting parties and those privy to the contract, are not enforceable by anything in the nature of action or suit founded on contract. Such actions and suits alike depend on privity of contract, and no possession of the land coupled with notice of the covenants can avail to create such privity: *Cox* v. *Bishop*. (1) But if the covenant be negative, so as to restrict the mode of use and enjoyment of the land, then there is called into existence an equity attached

(1) (1857) 8 D. M. & G. 815.

to the property of such a nature that it is annexed to and runs with it in equity: *Tulk* v. *Moxhay*. (1) This equity, although created by covenant or contract, cannot be sued on as such, but stands on the same footing with and is completely analogous to an equitable charge on real estate created by some predecessor in title of the present owner of the land charged. Such a charge was created in its inception by contract between A. and B., the lender and the borrower, but when B. has sold the land charged to C., A. cannot sue C. on the contract to repay, but can only enforce the charge against the land. This is the basis of the decision of the Court of Appeal in *Haywood* v. *Brunswick Permanent Benefit Building Society* (2), where it was held that, where land had been granted in fee in consideration of a rent-charge and a covenant to lay out money in building and repairing, the assignee of the grantee of the land was not liable on the covenant to repair, because, as Cotton L.J. put it, "the covenant to repair can only be enforced by making the owner put his hand in his pocket, and there is nothing which would justify us in going that length." In other words, effect is given to the negative covenant by means of the land itself. But the land cannot spend money on improving itself, and there is no personal liability on the owner of the land for the time being, because there is no contract on which he can be sued in contract. So in *Mander* v. *Falcke* (3) a mere occupier of land was held to be within the principle. In *London and South Western Ry. Co.* v. *Gomm* (4) Sir George Jessel states that in his view the doctrine is either an extension in equity of *Spencer's Case* (5) to another line of cases, or else an extension in equity of the doctrine of negative easements, but that, whatever it was, "the purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the

(1) 2 Ph. 774.
(2) (1881) 8 Q. B. D. 403, 409.
(3) [1891] 2 Ch. 554.
(4) 20 Ch. D. 562, 583.
(5) (1582) 5 Rep. 16 a; 1 Sm. L. C. 11th ed. p. 55.

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right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." He says also (1): "If it binds the land it creates an equitable interest in the land." These passages are cited as correct in the considered judgment of the Court of Appeal in *Rogers* v. *Hosegood*. (2) It is clear therefore that the person entitled to the benefit of the restrictive negative covenant over Blackacre has an equitable interest in Blackacre, and that such interest has the same nature and qualities as any other equitable interest in land in respect of priority, notice, and the like, but that notice forms no part of the cause of action in respect of such equitable interest. The plaintiff's claim depends on the validity and priority of his own charge, not on any notice, unless and until the owner of the land sets up as a defence the plea of purchaser for value without notice and with the legal estate. The fact that the usual contest in such cases is whether the landowner had notice or not has doubtless made it usual to speak of notice as an essential part of the plaintiff's case in order to enable the Court to bind the defendant's conscience; but it is quite clear that the equitable charge is created and exists independently of notice, and that no question of binding the defendant's conscience arises until he sets up the legal estate. Then notice became material, because it enabled the Court of Equity to bind the conscience of the defendant and forbid him to set up the legal estate. Under the old law, "If the legal title were used at law for a purpose inconsistent with good faith, then, undoubtedly, this Court would interfere, on the established principle of preventing a legal right from being enforced in an inequitable manner or for an inequitable purpose": per Lord Westbury L.C. in *Buckland* v. *Gibbins*. (3)

It was suggested that the Privy Council in *McLean* v. *McKay* (4) took the view that the person to be bound by the covenant must derive title from the covenantor; but the passage cited merely purports to state the effect of *Tulk* v. *Moxhay* (5), and cannot fairly be read as deciding anything on

(1) 20 Ch. D. 580.
(2) [1900] 2 Ch. 388, 405.
(3) (1863) 32 L. J. (Ch.) 391, 395.
(4) L. R. 5 P. C. 327, 336.
(5) 2 Ph. 774.

the point. It has not been, and could not, of course, be contended that Headde, who was a trespasser until he acquired a title under the Statute of Limitations, was a purchaser for value. He could not, therefore, have set up any want of notice as an effectual defence to an action to enforce the restrictive covenants against him, and I am of opinion, therefore, that the land in his hands was bound by these covenants.

The next point is the plea of the Statute of Limitations. Sect. 34 is as follows: "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

It is now settled that the effect of this section is to extinguish the title of the dispossessed owner, not to transfer it to the statutory owner: *Tichborne* v. *Weir* (1), where it was accordingly held that the statutory owner who had ousted a lessee did not become liable to the payment of rent and performance of covenants to which such lessee was liable; and it is argued from this that Headde acquired a title free from all burdens attaching to the former owner's estate. But the decision is no authority for such a contention. The lessee's covenants and liabilities were incident to and part of the lessee's estate, and that estate was extinguished. The burden of these restrictive covenants is not incident but paramount to the estate of the dispossessed owner, and all that the Act extinguishes is the right and title of the person who fails to make an entry or bring an action for the recovery of the land in question. The right to enforce these covenants was no part of his title, nor is such right within the Act at all, for it is obvious that the person entitled to enforce them cannot do so by making any entry or distress or bringing any action to recover land. On the contrary, his action proceeds on the assumption that the land is and will remain in the possession of the defendant. The real analogy is not to a lessee's covenants, but to rights of

(1) 4 R. 26; 67 L. T. 735.

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way and similar easements. If a trespasser acquires a statutory title to land over which such easements exist he cannot plead the Statute of Limitations to persons seeking to enforce them, but must shew extinguishment by abandonment or otherwise like any other landowner; for "in dealing with the Statute of Limitations the Court must do so upon the assumption that if it were not for the statute the action could be maintained": per Lord Esher in *Ecclesiastical Commissioners* v. *Parr* (1), where it was held that a squatter on copyhold land who has acquired a good title under the statute against the copyholder has no title to the fee against the lord, but that time begins to run against the lord only from the date at which, after proclamation or notice, the tenant has failed to come in and be admitted. The Statute of Limitations, therefore, is no answer.

The third point is this. The vendor says that both he and the purchaser in 1890 were purchasers for value without notice. The purchaser says that they had constructive notice. It is assumed that there was no actual notice, nor that form of constructive notice which arises from wilful abstention to inquire. Now it is well settled that a purchaser is bound to inquire into the title to the land offered to him by his vendor, and will be affected with notice of all that he would have ascertained if he had made proper inquiries, whether his abstention from inquiry is due to voluntary waiver or waiver under contract: *Wilson* v. *Hart* (2); *Patman* v. *Harland*. (3) The law is now declared by s. 3 of the Conveyancing Act, 1882: "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless (1.) it . . . . would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him." Sir George Jessel answers the question "What is reasonable inquiry?" thus in *Patman* v. *Harland* (3): "It has been held that he is to require the usual title whatever the usual title may be." Now the usual title is forty years: *In re Cox and Neve's Contract*. (4) In an ordinary case it is generally easy to

(1) [1894] 2 Q. B. 420, 430.
(2) (1866) L. R. 1 Ch. 463, 467.
(3) (1881) 17 Ch. D. 353, 355.
(4) [1891] 2 Ch. 109.

shew what would have been discovered if the full title had been shewn by producing that title. But here it is said that the paper title, prior to the twelve years' possession, was not the title that the vendor could produce. But, however plausible this reason for not producing more than twenty years' title may have seemed, the purchaser was not bound to accept it. If authority is needed for this, the recent case of *Jacobs* v. *Revell* (1) affords it. But it is obvious that such a title as the vendor in 1890 or 1901 had to offer was open to serious objections and risks, and that no Court would have compelled specific performance of an open contract to purchase land held under such a title. In *Moulton* v. *Edmonds* (2) Lord Campbell points out some of the risks: "The vendor's counsel first relied upon the new Statute of Limitations, according to which no claim can be made to realty more than twenty years after the right has accrued, and here there has been an undisturbed enjoyment, according to the deed of 1815, for forty-four years. But I do not think that the new Statute of Limitations in any respect abridges the period of sixty years, for which previously a good title must have been proved by the vendor. There are exceptions to the bar by lapse of time, by reason of infancy, and other disabilities, and the estimated duration of the life of man is still regarded as measuring the period during which the title must be proved, although attempts have been made by very distinguished persons to abridge this period, so as to facilitate the transfer of real property." And, indeed, it is obvious in the present case, for the person dispossessed may have been a tenant for life still alive. It is true that there are cases in which a title depending on the Statute of Limitations has been forced on a purchaser, but they are cases in which a particular objection, apparent on the face of the title as shewn, has been held to be covered by possession for the statutory period. Thus, in *Games* v. *Bonnor* (3) an estate tail suggested as an objection to the title was held to be statute-barred, and in *Scott* v. *Nixon* (4) the possible claim of the heir-at-law of

(1) [1900] 2 Ch. 858.
(2) (1859) 1 D. F. & J. 246, 250.
(3) (1884) 54 L. J. (Ch.) 517.
(4) (1843) 3 D. & War. 388; 61 R. R. 84.

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the testator was disposed of in a similar way. But the Court in these cases adjudicated upon the existence of the suggested title; it did not compel the purchaser to take a leap in the dark. It follows, therefore, that inasmuch as the present vendor and the purchaser in 1890 accepted a title that they could not have been compelled to take, they waived their right to the production of the full title on which they might have insisted and must be liable for the consequences.

Then it is said that there is nothing to shew that the full title would have disclosed the deed of 1872. But the plea of purchaser for value without notice is a single plea, to be proved by the person pleading it; it is not to be regarded as a plea of purchaser for value, to be met by a reply of notice. Thus, in *Attorney-General* v. *Biphosphated Guano Co.* (1), where an injunction was asked for to restrain interference with a right of way claimed under an agreement, the Court of Appeal (James, Baggallay, and Thesiger L.JJ.) say: "Upon the appeal it has been objected by the appellants that, looking to the pleadings, the fact of notice was not put in issue by the defendants except as regards Weguelin, and that the learned judge was not justified in deciding the case upon the want of notice to persons prior in title to Weguelin. We are of opinion that this objection is a well-founded one. The defence of a purchase without notice is one which ought to be specifically alleged as well as proved by those who rely upon it." It is therefore for the vendor to prove that he had no notice from the prior deeds, and he can only do this by producing such deeds. I see no hardship in this, but it would indeed be strange if the vendor, whose title is deficient in that it lacks the proper evidences for forty years, could give a better title than the man whose muniment room is filled with the proper equipment of deeds, and not the less strange because the deficiency of title results from the fact that part of the title depends on a successful trespass. The statutory title is due to the demerits of the owner who was careless enough to allow himself to be dispossessed for twelve years, not to any merits of the trespasser, who was a mere wrong-doer up to the last day of the twelve years. The latter is entitled

(1) (1879) 11 Ch. D. 327, 337.

to what the statute gives him, but no more, and those who purchase from him must take the risk of suffering for the infirmity of his title. The result is that a good title is not shewn at present.

[The rest of the summons was directed to stand over for production of further evidence on the question whether the purchaser had accepted the title by taking possession.]

Solicitors: *Granville Smith, Coleman, Betts & Co.; Harris, Chetham & Cohen.*

J. R. B.

Ex parte TRUSTEES OF THAVIE'S CHARITY.

Practice—Costs—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Reinvestment in Land—Ground-rent—Costs of Lease creating Ground-rent.*

The trustees of a charity obtained an order for the reinvestment of the purchase-money for lands of theirs, which had been taken by a corporation under the Lands Clauses Act, in the purchase of land. The contract entered into by the trustees, and approved by the Court, provided that on the conveyance of the land to the trustees they should grant to the vendors a lease for seventy-three years at a ground-rent, and that each party should pay their own costs of the lease:—

Held, that the corporation were not bound to pay the trustees' costs of the lease as part of the costs of reinvestment.

IN March, 1904, the trustees of Thavie's Charity took out a summons for the approval of the Court to the investment of 3000*l.*, part of a larger sum which had been paid into court by the corporation of London as the purchase-money for lands of the charity taken by them under the Holborn Valley Improvement Acts, in the purchase of lands in Leather Lane. The contract, which the Court was asked to approve, provided that as soon as the property was conveyed to the purchasers, the charity trustees, they should grant a lease thereof to the vendors for seventy-three years at a yearly rent of 105*l.*, and that each of the parties thereto should pay their own costs of the lease.

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By the order made on this summons, after stating that the Court approved the purchase, that a good title had been shewn, and a conveyance settled by the judge, it was ordered that, upon execution of such conveyance by the vendors, the sum of 3000*l.* should be raised out of the funds in court and paid to the vendors. And it was ordered, pursuant to s. 80 of the Lands Clauses Consolidation Act, 1845, that the corporation should pay to the applicants their costs (including therein all reasonable charges and expenses of and incidental thereto) of obtaining the order and of all proceedings relating thereto.

On taxation the taxing master allowed the charity trustees their costs of the lease granted by them to the vendors. The corporation objected. The master, in his reasons, stated that the granting of the lease was a condition of the contract, and the corporation had not objected to the form of the contract; and, further, that the purchasers could not accept a conveyance unless the counterpart of the lease were delivered to them at the same time, and the conveyance and lease were in effect one transaction.

The corporation took out this summons to review the taxation.

William Baker, for the summons. It is well settled that the costs, according to the Lands Clauses Act, of an investment in land only include such costs as would fall upon a purchaser under an open contract: *Ex parte Governors of Christ's Hospital* (1); *Ex parte Vicar of Sawston.* (2)

Owen Thompson, for the charity. The cases cited only refer to fancy costs, or costs which would usually be paid by the vendor. Here the purchase and the granting of the lease were both part of the same transaction; in fact, the granting of the lease was part of the purchase-money, for of course the charity paid a smaller price because they bought subject to the lease.

FARWELL J. If the taxing master had not allowed these costs I should have thought the point unarguable. It is clear upon principle, and well settled by authority, that under an

(1) (1875) L. R. 20 Eq. 605. (2) (1858) 27 L. J. (Ch.) 755.

order to pay costs of reinvestment according to the Act the corporation, or other persons ordered to pay costs, are only liable to pay such costs as would fall upon a purchaser under an open contract. In this case the parties have thought fit to add to the ordinary contract for sale an agreement that the purchasers shall grant a lease to the vendors, and the purchasers claim the costs of granting the lease. I cannot see any grounds for allowing them. It is said that the corporation ought to have objected to the form of the contract; but I do not see why they should. If the charity trustees chose to grant a lease of the property after they had bought it, that in no way concerned the corporation. The only plausible argument was that the lease and conveyance were both part of one transaction; but the answer to that is that the order refers to the conveyance only and not to the lease. To allow the costs of the latter would be to go behind the order and add something to it. These costs must be disallowed.

Solicitors: *City Solicitor; Pontifex, Hewitt & Pitt.*

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In re SIR EDWARD HULSE, Bart. BEATTIE *v.* HULSE.

[1900 H. 1211.]

Landlord and Tenant—Tenant for Life and Remainderman—Fixtures—Right of Removal—Intention to improve Inheritance.

A tenant for life of settled estates granted a lease for twenty-one years of a steam-mill and machinery. The lessee covenanted that he would at the end of the tenancy sell to the lessor all machinery then on the premises other than the demised machinery; and the lessor covenanted that he would pay for it. The tenant brought additional machinery into and affixed it to the mill. On the expiration of the tenancy the tenant for life bought this machinery under the provisions of the lease. He died, and his executrix claimed the machinery thus bought:—

Held, that, as between tenant for life and remainderman, chattels affixed to the soil by the tenant for life for purposes of trade did not become part of the freehold, and might be removed by him. The question must be determined by the intention of the person by whom the chattels were attached; and, in the absence of evidence to shew that the tenant for life intended to make a present to the remainderman, his executrix was entitled to the machinery.

On June 6, 1877, Sir Edward Hulse, Bart., who was tenant for life of the Hulse settled estates, granted a lease of Barking Mill (part of the settled estates) to Mr. T. D. Ridley for twenty-one years from Christmas, 1875, at a rent of 700*l.* a year. The lease comprised the steam and water corn-mill called the Barking Mill, together with the steam-engine, machinery, fixtures, and things mentioned in the schedule to the lease. It contained the following among other covenants by the lessee: (C) That he would keep in good condition the demised machinery. (G) That at the end of the term he would yield up to the lessor, inter alia, the demised machinery. (J) That the lessor might enter and inspect it. (N) "That the lessee will at the end of the tenancy sell to the lessor all the steam-engine, wheels, stones, going gear, tackle, and machinery then on the demised premises other than the demised machinery specified in the schedule hereto at such a sum as shall be fixed as the value by the arbitration of

two valuers," &c. (o) "That except for the purpose of renewing or replacing any part or parts of the demised machinery which shall be broken or worn out, or shall for any other reason require removal or replacing, the lessee will not, without the previous licence in writing of the lessor, erect or bring upon the demised premises in any one year any new or additional machinery or going gear exceeding in aggregate value the sum of 300*l.*"

The lessor covenanted for himself, his heirs, executors, and administrators, but only so as to render himself personally responsible while tenant for life of the demised premises: (s) "That the lessor will at the end of the tenancy take and pay for all the steam-engines, wheels, stones, going gear, tackle, and machinery then on the demised premises other than the demised machinery specified in the schedule hereto, and other than any machinery or going gear erected by the lessee in breach of the covenant hereinbefore contained and distinguished by the prefix (o)." The term "lessor" was to include Sir Edward Hulse and other the person or persons for the time being entitled to the reversion of the demised premises.

On the expiration of the tenancy in 1896 an award was made by which the machinery on the premises other than the demised machinery was valued at 2035*l.* Sir Edward Hulse paid this sum to the lessee, and subsequently endeavoured to let the mill, but in vain. He died in 1899.

His widow and executrix took out this summons, asking that the trustees of the estate during the infancy of the present baronet, who was tenant in tail thereof, might be ordered to deliver up to her the machinery which had been bought by Sir Edward Hulse.

Birrell, K.C., and *Ashton Cross*, for the executrix. As between the tenant for life and the remainderman the question whether the additions to the building are to be fixtures is one of intention. "Even where a person himself the owner of the fee has annexed any chattels of his own to his own land, he does not always cause the property in the chattels to cease to

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be personalty": per Lord Blackburn in *Wake* v. *Hall.* (1) By the agreement in the lease, which it was competent to the landlord and tenant to enter into, the chattels were made tenant's fixtures, and by the subsequent purchase the chattels became the property of Sir Edward Hulse as purchaser. The onus is on the defendant to shew that he meant to make a present of them to the reversioner. If Sir Edward Hulse had been his own tenant—that is to say, had been himself in occupation of the land—and had put in these chattels during his occupation, they would have been his own property. A fire-engine set up for the benefit of a colliery by a tenant for life was held to belong to his executor, for the increase of assets in favour of creditors: *Lawton* v. *Lawton.* (2) Reference in that case is made to "the case of a cyder-mill which is let in very deep into the ground," which Comyns C.B. "at the assizes at Worcester, upon an action of trover brought by the executor against the heir," considered to be personal estate. In the notes to *Elwes* v. *Maw* (3) in 2 Smith's Leading Cases, 11th ed. p. 223, it is said that the cases shew that the representative of the tenant for life is entitled as against the remainderman to fixtures erected wholly or in part for the furtherance of trade; that the remainderman is less favoured in law than the heir; and that there are some cases in which the executor has been permitted to remove even ornamental fixtures as against the heirs. In *Leigh* v. *Taylor* (4) it was held that the executor of the tenant for life was, as against the remainderman, entitled to remove tapestries affixed to the walls of a house by the tenant for life. Lord Halsbury L.C. points out in that case that the question turns on "the purpose of the annexation"—whether it is the case of landlord and tenant, or remainderman and tenant for life.

In this case the tenant would have been entitled to remove the things but for the tenant for life exercising his right of purchase under the lease; and by purchasing the chattels the tenant for life stands in the same position as the tenant.

(1) (1883) 8 App. Cas. 195, 204.
(2) (1743) 3 Atk. 13, 14. [This "fire-engine" is, of course, the early form of steam-engine used for pumping.—F. P.]
(3) (1802) 3 East, 38; 6 R. R. 523.
(4) [1902] A. C. 157.

[They also referred to *Lawton* v. *Salmon.* (1)]

Buckmaster, *K.C.*, and *H. B. Howard*, for the defendant. The question as to the ownership of the fixtures as between landlord and tenant does not arise here. The position is the same as if Sir Edward Hulse had paid for the things in the first instance. But for the agreement the tenant could have legally removed them. As their removal would have caused damage to the property, the landlord stipulated for the right to purchase them, and that is the only intention he had except that of benefiting the inheritance. The cyder-mill case cannot now be relied on as law: *Fisher* v. *Dixon.* (2) Fixtures erected and allowed to remain under circumstances like these do not belong to the executor of the tenant for life: *Bain* v. *Brand.* (3) As between tenant for life and remainderman, if this machinery has been affixed to the premises so as to enable the tenant for life to make a profit out of the mill, the Court will say it is his machinery. But if it was only placed there in order to enable him to let the mill, the Court will hold that it forms part of the mill: *Lawton* v. *Lawton.* (4) The arrangement in this case was that machinery should be brought on to the premises by the tenant and bought by the tenant for life. That was in order to enable the latter to let the mill. This machinery is valueless apart from the mill, and that is important as shewing the intention of the tenant for life. There was no intention that the machinery should be removable at any moment. If that had been the intention the lease would not have prohibited the tenant from removing it.

It became a fixture from the moment that it was put up. It became part of the soil, and neither the tenant nor the tenant for life had any right to remove it. It was intended to be an addition to the existing machinery. Fixtures are part of the freehold: *Monti* v. *Barnes.* (5)

No reply was called for.

(1) (1782) 1 H. Bl. 259, n, 260, n.; 2 R. R. 764.
(2) (1845) 12 Cl. & F. 312, 329; 69 R. R. 97.
(3) (1876) 1 App. Cas. 762.
(4) 3 Atk. 13.
(5) [1901] 1 K. B. 205.

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BUCKLEY J. Where the owner of the freehold affixes chattels to the freehold and dies, there exists no reason in the nature of things why as between his executor and his heir the former should take rather than the latter. The chattel affixed has in fact been attached to the freehold, and there is no reason as between the personal and the real representative of the dead man why the derivative owner of the freehold should not take it. In *Lawton* v. *Salmon* (1) and *Fisher* v. *Dixon* (2) the heir was accordingly held entitled. *Bain* v. *Brand* (3) is to the same effect. Why the executor succeeded in the cyder-mill case, which is mentioned in 3 Atk. 14 and 1 H. Bl. 260, n, it is impossible to say. There are no facts ascertainable to guide to any conclusion.

But the case is different when the two claimants are not alike persons deriving title under a previous owner of the freehold who attached the chattels, as, for instance, where the question is between tenant and landlord, or between tenant for life and remainderman. The old maxim "Quidquid plantatur solo solo cedit" was as between tenant and landlord long since relaxed for the benefit of trade. It was advantageous that the tenant should be at liberty, for the purposes of his trade, to affix chattels to the soil, and in his case there was established an exception by which he was entitled to remove the fixtures during the term. As between tenant for life and remainderman the same principle is applicable. It is advantageous that the tenant for life should be in such a position as to be able to improve the estate for his own enjoyment without being thereby compelled to make a present to the remainderman. The remainderman is not injured if the person deriving title under the tenant for life removes the fixtures, leaving the remainderman with the freehold in the same state as it would have been if the chattels had never been affixed. Lord Hardwicke in 1751 in *Dudley* v. *Warde* (4) said: "The case being between executor of tenant for life in tail, and a remainded (5) man, is not quite so strong as between landlord and tenant, yet the same

(1) 1 H. Bl. 259, n.; 2 R. R. 764.
(2) 12 Cl. & F. 312; 69 R. R. 97.
(3) 1 App. Cas. 762.
(4) (1751) Amb. 113, 114.
(5) *Sic* in Ambler.

reason governs it." Speaking of the two cases of tenant and landlord and tenant for life and remainderman, Rigby L.J. in *Ward* v. *Taylor* (1) goes a little beyond this sentence in saying that "the exception extends equally, as is shewn by *Dudley* v. *Warde* (2) to the case of a tenant for life, and the person who comes into possession of the estate upon his death." In *Fisher* v. *Dixon* (3) Lord Cottenham puts the case of tenant and landlord and that of tenant for life and remainderman together in a separate class, distinguishing them from that of executor and heir. Accordingly in *Lawton* v. *Lawton* (4), *Dudley* v. *Warde* (2), and *Leigh* v. *Taylor* (5) the executor of the tenant for life, and not the remainderman, was held entitled. In *Leigh* v. *Taylor* (5) (being the title of *Ward* v. *Taylor* (1) on appeal to the House of Lords) the question being, as I have said, between tenant for life and remainderman, the learned Lords treated the question as one to be determined, not so much by an investigation of the physical means used for the attachment, as of the purpose for which and of the intention of the person by whom the chattels were attached. The question is, not what is the nature of the attachment of the chattel to the soil, but what, having regard to all the facts of the case, must have been the intention of the tenant for life. It is upon these principles, I think, that this case has to be decided. The question has been argued whether the true principle is that where the tenant fixes chattels to the freehold with the right to remove them during his term, that right is an exception which enables him to remove part of the freehold, or an exception by which the chattels do not become part of the freehold. It appears to me that the exception is an exception to the maxim "Quidquid plantatur solo solo cedit." It is not that the law allows the tenant for years to remove part of the freehold, but that the chattels have not become part of the freehold. The exception makes them not part of the freehold.

The facts are these. Sir Edward Hulse was tenant for life

(1) [1901] 1 Ch. 523, 530.
(2) Amb. 113, 114.
(3) 12 Cl. & F. 312, 328; 69 R. R. 97.
(4) 3 Atk. 13.
(5) [1902] A. C. 157.

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of settled estate. In 1877 he executed a lease of a mill with certain machinery in it. As to that machinery no question arises. By the bargain between him and the lessee the latter might under clause (o) of the lessee's covenants in the lease erect machinery in the mill up to a certain sum. If he did so, then he was bound under clause (N) to sell that machinery to the lessor at the end of the term; and under clause (S) of the lessor's covenants Sir Edward Hulse covenanted to buy it. Certain additional machinery was brought upon the premises by the tenant. The result was, therefore, that as between landlord and tenant the tenant brought upon the freeholds machinery which he would have been entitled to remove during the term, but that by the special bargain he had agreed that he would sell it to the lessor. The lease came to an end, and the lessor did buy this machinery and paid 2035*l.* for it. He subsequently died in 1899. The question is whether his executor is entitled to the machinery which he thus paid for. In my opinion he is. It is plain that when the machinery was brought on the land it did not become part of the land, so that the tenant could not remove it. If the lessor had died before the end of the lease and the remainderman had not wished to buy the machinery, the tenant could have taken it away. The term came to an end, and the lessor did buy it. It had not become part of the soil up to that time. What was the lessor's intention when he bought it? Did he wish to make a present to the inheritance? Certainly not. He looked out for another tenant to whom he could sell the machinery. That tenant would have been entitled to remove the machinery during his term. If Sir Edward Hulse had thought it better to work the mill himself, he would have been in the same position as any other tenant who brought machinery on to the land. I cannot find any evidence to shew that he intended to make a present to the remainderman. This machinery never became part of the soil. I think, therefore, that the summons succeeds.

Solicitors: *Payne, Shaw-Mackenzie & Lake.*

H. C. R.

In re WENBORN & CO.

BUCKLEY J.

1905

Jan. 31.

[0017 of 1905.]

Company—Winding-up (Voluntary)—Costs of Outside Litigation—Action brought against Company before Winding-up.

Where there is a winding-up of a company (whether compulsory or voluntary) all claims of creditors, including those in respect of costs, ought primâ facie to be dealt with in the winding-up in accordance with the rules applicable to the distribution of the assets; but if an action is pending to which the company is a party, and the company by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, and must in case of failure pay the costs in full.

C. brought an action against a company for damages for breach of contract. After a day had been fixed for the trial the company passed an extraordinary resolution for voluntary winding-up. Within a week afterwards C. wrote to the liquidator asking whether he was prepared to admit C.'s claim in whole or in part. The liquidator replied that he could not admit the claim. At the trial C. recovered judgment for damages and costs:—

Held, that the liquidator had adopted the defence of the action, and that C.'s costs of it must be paid in full out of the assets of the company.

Bailey and Leetham's Case, (1869) L. R. 8 Eq. 94, followed.

In re Thurso New Gas Co., (1889) 42 Ch. D. 486, distinguished.

BEFORE Wenborn & Co., Limited, went into liquidation, one Louis Charlier brought an action against the company in the King's Bench Division for damages for alleged breaches of contract, extending over a considerable period, with reference to supplying the company with coal. The action proceeded in the Commercial Court, and was in the paper for trial on May 17, 1904. The parties were not then ready, and the trial was postponed until after Whitsuntide. On June 16 an application was made to the Court to have a day fixed for the trial, and a day in July was fixed for that purpose.

On June 17 the company passed an extraordinary resolution for voluntary winding-up.

On June 22 Charlier's solicitors wrote to the liquidator's solicitor as follows: "In view of the resolution for voluntary winding-up of the above company, we shall be glad if you will

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write us, definitely stating whether your client, the liquidator, is prepared to admit the claim of our client, M. Charlier, in respect of the breach of contract for which the action is now proceeding, at the amount claimed or at any smaller amount, or whether your client proposes, as we understood at our interview with you that he does, to dispute the claim altogether. We should, however, like to have it definitely put in writing, whatever course is proposed to be adopted." This letter was sent also to the liquidator himself. The liquidator's solicitor on the following day replied as follows: "In reply to your letter of yesterday's date, as I informed you at our interview, the liquidator cannot admit the claim of your client in this action."

The action accordingly proceeded, and the plaintiff obtained judgment for damages and costs.

Charlier then took out an originating summons in the winding-up, raising the question whether the costs of the action were to be paid in full out of the company's assets, or could only be proved for in the winding up.

Ernest Todd, for the applicant. The costs which the applicant recovered in the action ought to be paid in full out of the company's assets. The general principle is that "a company in winding-up ought to be dealt with as a matter of course like any other litigant, and if an action be brought or resisted for the benefit of the estate, and that action be brought fruitlessly, or defended fruitlessly, then the estate, that is to say, the other creditors, ought, like everybody else, to be fixed with the costs to which they have improperly and unnecessarily put their opponent": per James V.-C. in *Bailey and Leetham's Case*. (1) In that case the winding-up was under a compulsory order, and the official liquidator obtained the leave of the Court to defend the action.

The practice ought to be the same where the winding-up is voluntary. Under s. 133 (7.) of the Companies Act, 1862, one of the consequences ensuing upon a voluntary winding-up is that "the liquidators may, without the sanction of the Court,

(1) L. R. 8 Eq. 94, 97.

exercise all powers by this Act given to the official liquidator." Under s. 95 of the same Act the official liquidator might, with the sanction of the Court, defend any action in the name of the company. It was open to this liquidator to apply to the Court under s. 138 of the Act of 1862, but he chose not to take that course, and the correspondence shews that he adopted the defence of the action. Where an action is commenced by a company, and after a voluntary winding-up has commenced the liquidator obtains the leave of the winding-up Court to continue the action, and fails in it, the successful defendant is entitled to be paid his costs in full out of the company's assets: *In re London Drapery Stores.* (1) There Wright J. acted on the principle laid down in *Boynton* v. *Boynton.* (2) The decision of Wright J. is not rendered inapplicable because a supervision order had been made in the case before him. The respondent will rely on *In re Thurso New Gas Co.* (3); but *Bailey and Leetham's Case* (4) was there cited without disapproval by the Court, and all that Kay J. did, in his discretion, was to refuse leave to a plaintiff in an action against the company to continue proceedings under his Scotch judgment except upon the terms of having no priority over the other creditors.

Hon. J. Mansfield, for the liquidator. The plaintiff is not entitled to be paid his costs in full; he can only prove for them in the winding-up. "The intention of the Act, where there is a resolution passed to wind up voluntarily, is (s. 133) that all the creditors shall be paid pari passu, and the Court will therefore interfere by injunction to restrain one creditor from seizing an undue share of the assets for his own benefit. And, if a creditor commence or proceed with an action for his debt after the winding-up commences, he can at most only add his costs to his debt": Buckley on Companies, 8th ed. p. 285. That rule was followed by Kay J. in *In re Thurso New Gas Co.* (5), which is directly in point here. Where a creditor, after voluntary winding-up commenced, commenced an action against the company, and the liquidator moved to restrain the action,

(1) [1898] 2 Ch. 684.
(2) (1879) 4 App. Cas. 733.
(3) 42 Ch. D. 486.
(4) L. R. 8 Eq. 94.
(5) 42 Ch. D. 491.

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and while the motion stood adjourned the plaintiff obtained a verdict, Jessel M.R. stayed execution upon the terms of the creditor being admitted to prove only for his debt and costs: *In re Poole Firebrick and Blue Clay Co.* (1) By rule 97 of the Companies (Winding-up) Rules, 1903, "a creditor shall bear the cost of proving his debt unless the Court otherwise orders." The object of winding-up is a rateable distribution of the assets. [He also referred to *In re Snyder Dynamite Projectile Co.* (2)]

No reply was called for.

BUCKLEY J. The cases cited to me are not perhaps easily reconcilable, but the principle which seems to underlie all of them is that when there is a winding-up of a company—whether the liquidation be compulsory or voluntary—all claims of creditors ought primâ facie to be dealt with in the winding-up in accordance with the rules applicable to the distribution of the assets, and that costs ought also to be dealt with in like manner; but that if an action is pending to which the company is a party, then, if the company which is in liquidation acting by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, and must in case of failure pay the costs in full. In other words, the other creditors, for whose benefit the action is defended, must in such case bear the costs. The question here is: Did this liquidator adopt the proceedings on behalf of the estate and fail? If he did, the estate must pay the costs. The present case falls to be decided—as many cases do—on its own particular circumstances. M. Charlier said that there had been breaches of a contract, extending over a considerable period, with reference to the supply of coal, and in respect of the alleged breaches he brought an action for damages—for unliquidated damages, not for debt. That action proceeded in the Commercial Court, and was ready for trial on May 17, 1904. The parties were not then ready, and accordingly the trial was postponed until after Whitsuntide. On June 16 an application was made to the Court to

(1) (1873) L. R. 17 Eq. 268. (2) [1893] W. N. 37.

have a day fixed for the trial, and a day in July was fixed. In the meantime, on June 17, the company passed an extraordinary resolution for voluntary winding-up. Then followed certain correspondence, on which I rely for my decision in this case. [His Lordship read the correspondence above set out, and continued:—]

The effect of this correspondence is that the plaintiff says, "I have an action against your company for damages. You are its liquidator. Do you purpose to admit my claim for any, and what, amount?" And the liquidator replies, "I do not admit your claim at all." The liquidator thus adopted the defence in the action, and elected that it should go on. The action went on, and the plaintiff succeeded in obtaining judgment for damages and costs. The proper course for the liquidator to pursue when he got the plaintiff's letter was to apply, as he could have done, to have the action stayed; had he done so the judge might probably have taken the view that the action might well proceed, and would have let it go on on the terms that the plaintiff, if he succeeded, should add his costs to the amount for which he succeeded in recovering judgment. But the liquidator, instead of taking this course, resisted the claim altogether and adopted the defence on behalf of the estate, and it seems to me that the other creditors will have to bear the costs—in the sense that the costs must be paid out of the company's assets. As to *Bailey and Leetham's Case* (1), and other cases which have been cited to me, there is no real difficulty. When the voluntary liquidator, or the liquidator in a compulsory winding-up, comes to the Court for leave to bring or defend an action by or against the company, and obtains this leave, the judge in effect pledges the assets of the company for the costs of the action which he authorizes the liquidator to bring or adopt or defend. In *Bailey and Leetham's Case* (1) leave was given to the liquidator to defend an action brought against the company, and when the company lost the action James V.-C., as he then was, ordered the costs in full to be paid out of the company's assets. The principle of that case applies here. This

(1) L. R. 8 Eq. 94.

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liquidator was not bound to go to the Court for leave, although he might have done so, but he elected to defend the action and adopted the defence, and the costs in full must come out of the assets. I was properly pressed by Mr. Mansfield with the case of *In re Thurso New Gas Co.* (1); but I have two observations to make on that case. One is that the passage relied on at p. 491 of the report deals with the case of a creditor suing for a debt: there is some difference for this purpose between suing for a debt and suing for damages. The other is that there was not in that case, as there was here, a request to the liquidator to admit the claim. Here the reply of the liquidator is such an adoption of the defence to the action as to bring the case within the principle of *Boynton* v. *Boynton* (2), which was adopted by Wright J. in *In re London Drapery Stores.* (3) The defence has been adopted with all its consequences, including the liability to pay costs. It has been adopted as a whole, and the liquidator must out of the assets pay in full the costs of the action from its commencement, and also the costs of this application.

Solicitors for applicant: *Church, Rendell & Co.*
Solicitors for liquidator: *Goodacre, Harrison & Darrell.*

(1) 42 Ch. D. 486. (2) 4 App. Cas. 733.
(3) [1898] 2 Ch. 684.

F. E.

MASON *v.* MOTOR TRACTION COMPANY, LIMITED.

BUCKLEY J.

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Jan. 27; *Feb.* 2.

[1905 M. 90.]

Company — Memorandum of Association — Reconstruction under Power in Memorandum—Sale of Assets for Shares in New Company—Partly paid Shares—Distribution of Consideration—Evidence—Unstamped Agreement —Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

A company authorized by its memorandum of association to sell its undertaking for "shares" may, if there is nothing in the context or in the memorandum or articles of association as a whole so to qualify the meaning of the word "shares" as there used as to confine it to fully paid shares, accept partly paid shares as consideration.

MOTION.

The company was incorporated in 1898 with a capital of 420,000*l.*, divided into 42,000 shares of 10*l.* each, whereof 40,000 were ordinary shares and 2000 were founder's shares. 12,743 shares in all were issued. The company was originally called the London Steam Omnibus Company, Limited, and in August, 1899, its name was changed to that of the Motor Traction Company, Limited. The attempt to run motor omnibuses did not succeed, and the company carried on for some time a general business as vendors of motor cars; but this also failed. Various suggestions for reconstruction were made. The company held a licence to work patents for motor omnibuses, which licence would be forfeited if they went into liquidation except with a view to reconstruction. The value of this licence was increasing and fresh capital was wanted. It was therefore proposed to promote a new company to be called the London Motor Carriage and Omnibus Company, Limited, to which the undertaking and assets of the old company might be sold.

Amongst the objects of the old company specified in its memorandum of association were the following: Clause 3 (xiv.), to accept payment for any property or rights sold or otherwise disposed of or dealt with by the company in cash or in shares of any other company, or in both; (xv.) to promote companies, to take over, purchase, or acquire any property in which the company was interested, and to acquire, dispose of, and otherwise

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deal with the shares of such companies, or in any other companies; (xxii.) to "issue on commission, subscribe for, take, acquire, and hold, sell, exchange, and deal in shares, stocks, bonds, obligations, or securities of any Government, authority, or company"; (xxiv.) "to sell the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for a consideration consisting in whole or in part of cash, or shares or debentures of any other company or companies having objects whether similar or not to those of this company"; (xxv.) "to distribute any of the property of the company among the members in specie, but so that no distribution amounting to a reduction of capital be made except with the sanction (if any) for the time being required by law." Clause 82 of the articles of association enabled the directors in their absolute discretion, on behalf and in the name of the company or otherwise, to do various things, and included a power to them (sub-clause xiv.) "to sell or dispose of the undertaking of the company or any part thereof for such consideration as the directors may think fit, and, in particular, for shares, debentures, or securities of any other company or companies." Art. 132 empowered the liquidator on any winding-up, with the sanction of an extraordinary resolution, to "divide among the contributories in specie the whole or any part of the assets of the company." Art. 133 provided that—"Any such liquidator may (irrespective of the power conferred upon him by the Companies Act and as an additional power) with the consent of a special resolution sell the undertaking of the company, or the whole or any part of its assets, for shares fully or partly paid up, or the obligations of, or other interest in, any other company or companies, and may by the contract of sale agree for the allotment to the members direct of the proceeds of sale in proportion to their respective interests in the company, and in case the shares of this company shall be of different classes, may arrange for the allotment in respect of preference shares of this company, of obligations of any other company or companies, or of shares of any other company or companies with any preference or priority over, or with a larger amount paid up, than the shares allotted in respect of ordinary

shares of this company, and may further by the contract limit a time at the expiration of which shares, obligations, or other interest, not accepted or required to be sold, shall be deemed to have been refused, and be at the disposal of the liquidator or the purchasing company." Art. 134 was as follows: "Upon any sale under the last preceding article, or under the powers given by s. 161 of the Companies Act, 1862, no member shall be entitled to require the liquidator either to abstain from carrying into effect the sale or resolution authorizing the same, or to purchase such member's interest in this company; but in case any member shall be unwilling to accept the shares, obligations, or interests to which under such sale he would be entitled, he may within fourteen days of the passing of the resolution authorizing the sale, by notice in writing to the liquidator, require him to sell such shares, obligations, or interests, and thereupon the same shall be sold in such manner as the liquidator may think fit, and the net proceeds shall be paid over to the member requiring such sale."

By an agreement of December 9, 1904, between the company (thereinafter called the Motor Company) of the one part and F. G. Hackney on behalf of the new company of the other part, after reciting the company's power under the memorandum to sell its undertaking, that a new company was about to be incorporated with a capital of 65,000*l.*, divided into 130,000 shares of 10*s.* each, and that one of the objects of the new company was to enter into an agreement "adopting these presents," it was agreed that all the property and undertaking of the Motor Company should be sold to the new company as from November 30, 1904, the new company taking over all debts, liabilities, receipts, and profits as from that date. Clause 3 provided—"The consideration for the said sale shall be the allotment to the Motor Company or its nominees of 127,430 shares in the capital of the intended company with 7*s.* 6*d.* credited as paid therein." "6. Nothing in this agreement contained shall require the Motor Company or any liquidator thereof to be registered in respect of any of the shares agreed to be allotted" under clause 3 hereof. "10. If the Motor Company shall within twelve calendar months after the completion

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of the said sale pass a resolution for the voluntary winding-up of its affairs, the whole of the costs and expenses of and incident to such liquidation shall be borne and paid by the intended company." "11. This agreement is conditional on the same being ratified by resolution of a general meeting of the Motor Company, and if the same is not so ratified within twenty-one days from the date hereof either of the parties hereto may by notice in writing rescind the same." The agreement contained no provisions for the distribution amongst the members of the shares to be taken as consideration. On December 10, 1904, the secretary, by order of the board, sent notices to the shareholders of a meeting to be held on December 19 to consider the conditional agreement of December 9 "effecting the sale of the undertaking of the company and all its property and assets upon the terms therein mentioned," and, if thought fit, to pass a resolution approving the agreement, and authorizing the directors "to carry the same into effect, with such, if any, modifications as they may think fit." The notice in each case was accompanied by a circular from the directors recommending the reconstruction, a form of proxy, and a print, headed with the company's name and the words "Scheme of Reconstruction," the proposed scheme being set out as follows: "1. A new company to be formed with the same name as the existing company, or some other suitable name, with a capital of 65,000*l.* divided into 130,000 shares of 10*s.* each. 2. The existing company, in exercise of the power contained in its memorandum of association, to sell its undertaking and property to the new company for the consideration of 127,430 shares, each with 7*s.* 6*d.* credited as paid, in the capital of the new company, to be allotted to the company or its nominees, and on the footing that the new company shall undertake all the debts and liabilities of the existing company, and pay all the costs of liquidation and of carrying the scheme into effect. The liability of 2*s.* 6*d.* on the said shares to be payable, 3*d.* on claim being made therefor, 3*d.* on allotment, and the balance as required by calls, not exceeding 6*d.*, and of which not less than two calendar months' notice must be given. 3. Every member of the existing company to be

entitled to claim, within the time to be limited for that purpose, ten of the above-mentioned shares of the new company, each with 7*s.* 6*d.* credited as paid up thereon, in respect of every 10*l.* share held by him in the existing company. 4. The existing company to go into voluntary liquidation and the distribution of the said 127,430 shares in the new company to be made by the liquidator, who shall be at liberty to deal with and dispose of such of the said shares as may not be claimed or applied for by shareholders in the existing company in the manner and within the time fixed for making such claim or application." The meeting of December 19 was adjourned to January 4, 1905, when the resolution approving the agreement and authorizing the directors to carry it into effect was passed.

Mr. Percy Mason, a holder of 150 fully paid shares of the old company, commenced proceedings against the company and Hackney, and now moved for an injunction to restrain them till the trial of the action from carrying into effect the agreement of December 9, 1904, or from otherwise carrying into effect the scheme of reconstruction intended to be carried out by means of the agreement.

Buckmaster, K.C., and *F. Whinney*, for the plaintiff. We ask for an injunction to restrain the defendants from carrying the agreement into effect.

[BUCKLEY J. The agreement is not stamped.]

Astbury, K.C., and *H. E. Wright*, for the defendants. We will undertake to stamp the agreement if the injunction is refused.

Buckmaster, K.C., and *F. Whinney*. We can proceed without putting in the agreement itself. We will amend our notice of motion, and simply ask that the defendants may be restrained from carrying out the reconstruction pursuant to their notice of December 10, 1904.

BUCKLEY J. If both parties admit that the agreement shews the manner in which it is proposed to carry out the scheme, I can look at a copy of it.

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[The admission was made.]

We object to this scheme because it provides for a reconstruction by illegal means on a basis which will destroy all the rights of shareholders. A company with such a power as this cannot sell its undertaking for shares which are not fully paid.

This is a reconstruction under powers contained in the memorandum of association of the company, not under s. 161 of the Companies Act, 1862. Neither the memorandum nor the articles give the company power to sell its undertaking for partly paid shares. The company cannot impose upon the shareholders a liability to subscribe more capital or have their shares forfeited and get nothing at all. Shareholders cannot be forced to take shares on which there is a liability. The Court does allow a company under powers contained in its memorandum to sell its undertaking for shares, and no shareholder can dissent: *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1); *Doughty* v. *Lomagunda Reefs, Ld.* (2); but in those cases the consideration was fully paid-up shares. If the company is wound up and the liquidator distributes the assets, we shall have to accept these partly paid shares or forfeit all our interest in the company. A right to distribute in specie does not give power to impose this liability, or deprive us of our property: *Manners* v. *St. David's Gold and Copper Mines, Ld.* (3) There is only one case in which a sale for partly paid shares has been upheld, and that was on an application made to the Vacation Court: *Honig* v. *Blackett's Mines, Ld.* (4)

[BUCKLEY J. I do not see why the company should not sell for partly paid shares. The question as to what they are going to do with those shares does not at present arise.]

Astbury, K.C., and *H. E. Wright*, for the company. In cases under s. 161 a sale for partly paid shares is allowed: *In re City and County Investment Co.* (5); *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (6) The language of s. 161 is practically the same as that in this memorandum.

(1) [1892] 3 Ch. 454.
(2) [1902] 2 Ch. 837.
(3) [1904] 2 Ch. 593.
(4) (1901) 45 Sol. J. 770.
(5) (1879) 13 Ch. D. 475.
(6) (1889) 43 Ch. D. 452

Therefore the sale to the new company ought to be allowed to proceed. The second question does not arise. We have no intention of interfering with the rights of the shareholders. The agreement is only for the carrying out of the sale; it does not extend to the distribution of the assets. We will undertake not to give effect to that part of the scheme without a special resolution of the company.

Disturnal, for Hackney.

Buckmaster, K.C., in reply.

Cur. adv. vult.

Feb. 2. BUCKLEY J. The scheme of reconstruction dated December 10, 1904, contains four paragraphs. The first two deal with the formation of a new company and a sale by this company of its undertaking to that company for partly paid shares. The last two paragraphs deal with the manner in which the shares which form the purchase consideration are to be dealt with. The plaintiff has argued this motion as if the distribution of the purchase consideration under the last two paragraphs of the scheme had been resolved upon and was a matter for present consideration. In my opinion, that is not the case. The company have passed a resolution approving a certain conditional agreement dated December 9, 1904, and authorizing the directors to carry it into effect. I am precluded from looking at that document as an agreement, for it is not stamped. It has, I am told, been carried in for adjudication. It would be unfortunate if I were compelled to require it to be stamped for the purposes of an argument which, if successful, would preclude it from ever being carried into effect. I am not, I think, driven to that course. I can look at a copy of the document, not as an agreement, but as a document evidencing the terms upon which the company by the resolution which has been passed propose to sell, if they are not upon the present motion restrained from selling. Upon looking at it I find that it contains nothing addressed to the last two paragraphs of the scheme. The company have simply resolved to sell for a certain number of partly paid shares. The whole question before me is whether a proposal

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so to sell is ultra vires. Looking at the contemporaneous circular of December 10, I agree that the company no doubt intend, if they legally can do so, to deal with the 127,430 shares which will form the purchase consideration by distributing them amongst the holders of the 12,743 shares in their own company. But the question whether they can legally so distribute them as suggested in the last two paragraphs of the scheme will not arise until the necessary steps are taken for authorizing such a distribution. The defendants are prepared to undertake not to carry out paragraphs 3 and 4 of the scheme without a further resolution of the company. Upon that undertaking being given, it is plain that the question does not arise at present. Mr. Buckmaster had the courage to argue that I ought to restrain the company from holding a meeting to consider such a method of distribution. I cannot do that. The company may meet and discuss anything they like. When they have arrived at a conclusion there will arise for the first time for decision the question whether such resolution as they pass can legally be carried into effect. From the foregoing it results that the only question I have to determine upon this motion is whether under clause 3 (xxiv.) of the memorandum of association this company can sell for partly paid shares. There is nothing, in my judgment, in the context or in the memorandnm or articles of association as a whole so to qualify the meaning of the word "shares," as there used, as to confine it to a particular class of shares, namely, shares fully paid. Upon the same word in s. 161 of the Companies Act, 1862, it was decided in *In re City and County Investment Co.* (1), and subsequent cases, that a sale may be made for partly paid shares. I think the same is true of this memorandum of association. There is no reason in the nature of things why a company whose objects include subscribing for, taking, and holding shares should under an authority to sell for shares be precluded from taking shares partly paid. If the shareholders, as distinguished from the corporation, were to be compelled to become the holders of the shares, and thus come under liability, a totally different

(1) 13 Ch. D. 475.

question would arise. The result of the present transaction is simply that the partly paid shares which form the purchase consideration become assets of the selling company, and as such must be dealt with as such assets can legally be dealt with by the corporation. In my judgment, this sale for partly paid shares is not upon that ground open to question. The defendants, therefore, giving the undertaking above stated, there will be no order upon the motion except that the costs be costs in the action.

Solicitors: *J. Arscott Bartrum; W. J. Hunter.*

H. C. R.

In re ISAAC. HARRISON *v.* ISAAC.

[1904 I. 2291.]

Will—Construction—Two Residuary Gifts—Lapse of Legacy.

Testator, by his will, appointed H. his executor, then gave pecuniary legacies to sixteen persons, including H., bequeathed his watch to a nephew, and then directed that "the remainder of" his "property" should "pass as follows, viz. to be divided amongst" certain named persons in defined shares. The will concluded as follows: "And I appoint my executor my residuary legatee."

Two of the legacies lapsed by death of legatees in the testator's lifetime:—

Held, that the lapsed legacies fell into the first residue and did not go to H.

JOSEPH ISAAC, by his will dated September 21, 1899, appointed Thomas Harrison his executor, with power to sell all the property of which the testator might be possessed at the time of his death and to dispose of the same as hereinafter directed, and directed payment of his just debts and funeral and testamentary expenses. Then the testator gave pecuniary legacies to sixteen persons, including his executor, and certain servants and friends, bequeathed his watch to a

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nephew, directed that all his legacies should be paid free of legacy duty, and concluded as follows:—

"The remainder of my property shall pass as follows, viz. to be divided amongst my nephews and nieces or to their heirs in the following proportions, that is to say, to my nephew Maurice James Isaac [address given] one-fourth part of the said remainder, to the orphan children of my late sister's deceased daughter Louisa Goodall, to be equally divided amongst them, one-fourth part of the said remainder, the money to be paid to [two persons named] to be held or applied by them for the benefit of the said orphan children . . . . to my nephew (in law) Alfred D. Hoskins [described] or in the case of his death to be equally divided amongst his children one-fourth part of the aforesaid remainder, to my sister's other daughter, M. A. Whittle [residence stated] or her heirs the remaining one-fourth part of the said remainder. And I appoint my executor my residuary legatee."

Two of the sixteen pecuniary legatees died in December, 1899, and May, 1904. The testator died in September, 1904, and his will was proved in the following month. There was no real estate.

T. Harrison took out an originating summons, to which the persons entitled under the first residuary gift were defendants, raising (amongst other questions) the questions—(1.) Whether the appointment of the plaintiff as residuary legatee operated to revoke or defeat the previous bequest of the remainder of the testator's property to the defendants? (2.) Whether by the lapse of the two pecuniary legacies, owing to the deaths of the legatees in the testator's lifetime, the same "remainder" was increased by the amount of the lapsed legacies, or passed to the plaintiff as residuary legatee?

The summons was heard on February 4, 1905, by Buckley J., who decided that the appointment of the plaintiff as residuary legatee did not revoke the previous bequest of the "remainder."

The second question was then argued.

Sherrington, for the plaintiff. In Theobald on Wills, 5th ed. p. 659, the rule is correctly stated as follows: "So, if a testator

gives the remainder of his property to A. and makes B. his residuary legatee, B. will take only lapsed legacies." In support of this passage the learned author cites *In re Jessop* (1), *Davis* v. *Bennet* (2), *Kilvington* v. *Parker* (3), and *Bristow* v. *Masefield*. (4)

In *Davis* v. *Bennet* (2) the testator gave the remainder of his personal estate to his sisters and their issue, and later in the will appointed his wife his "residuary legatee"; and Romilly M.R. held that the first gift of residue was not revoked by the appointment of a residuary legatee, and said that the second gift "might still operate on lapsed legacies."

In *In re Jessop* (1), the testatrix gave several pecuniary and some specific legacies, and then proceeded as follows: "The remainder of my property I leave to my sister Sally Fetherston." Then she gave some more legacies, and ultimately made the following appointment: "I appoint my two sisters, Sally Fetherston and Octavia Gregory, my executrixes and residuary legatees of this my last will and testament." At the death of the testatrix some of the legacies had lapsed, and the Lord Chancellor of Ireland in his judgment said (5): "It is conceded that these have fallen in for the benefit of the two residuary legatees," and held that their appointment as residuary legatees did not give them the general residue, but that that was still covered by the former gift of "remainder" to "Sally." He does not intimate any doubt as to the lapsed legacies being caught by the second residuary gift.

The direction to pay debts and funeral and testamentary expenses first, before the gift of "the remainder," supports the view that that gift was specific. If it was residuary, there was nothing on which the residuary gift to Harrison could operate.

Buckmaster, *K.C.*, and *Edward Ford*, for the defendants. The lapsed legacies fall in for the benefit of the first residuary legatees. When a testator gives in clear words all his property (with the exception of some legacies to other persons) to A.

(1) (1859) 11 Ir. Ch. Rep. 424.
(2) (1861) 30 Beav. 226.
(3) (1872) 21 W. R. 121.
(4) (1882) 31 W. R. 88.
(5) 11 Ir. Ch. Rep. 427.

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and then makes a residuary gift to B. and C., unless A. dies in testator's lifetime, the second gift fails, because there is nothing on which it can operate: *In re Spencer.* (1)

Here there was a good residuary gift to the defendants. Legacies lapsing fall into that residue, and it is only when the first residuary gift fails that the second one comes into operation. In that way effect can be given to both the gifts.

[*Bristow* v. *Masefield* (2) and *Kilvington* v. *Parker* (3) were also referred to.]

Sherrington, in reply, referred to *Easum* v. *Appleford.* (4)

BUCKLEY J. I have already held in answer to the first question that the appointment of the executor as residuary legatee does not defeat or revoke the previous gift of the remainder of the testator's property. It remains for me to determine what is the destination of the legacies which have lapsed by the deaths of the two legatees in the lifetime of the testator.

Now if the will had not contained these last words appointing the executor residuary legatee, it seems to me that the words "the remainder of my property shall pass," &c., would have constituted a perfectly good residuary bequest. But the will does contain the words I have mentioned. Does that fact alter the construction which I have placed on the first residuary gift? I do not think it does, unless the effect be to reduce the earlier words to silence. Is it possible, without doing this, to give a proper effect to the later words? In my judgment it is, because if the prior gift of one or more of the shares of "the remainder" were to fail, owing to a lapse by the death of the legatee in the lifetime of the testator, the subsequent disposition appointing a residuary legatee would take effect. If some person entitled to a share of the remainder died in the lifetime of the testator, there would be a lapse of a part of the first disposed of residue, and under the second disposition the residuary legatee would take something.

(1) (1886) 54 L. T. 597.
(2) 31 W. R. 88.
(3) 21 W. R. 121.
(4) (1840) 5 My. & Cr. 56, 61; 51 R. R. 238, 248.

The testator makes certain gifts, and provides that "the remainder of my property shall pass as follows." I think that means that, subject to providing for such of the previous gifts in the will as take effect, the remainder of the property shall pass in the manner indicated. In other words, the prior gift is a residuary bequest. Then there is another residuary gift to which effect can be given by holding it to mean that, if any of "the remainder" of the property is undisposed of, anything to be swept up is to belong to the executor, who is to take it beneficially. It does not seem to me that there is any authority exactly in point. The nearest case is that of *In re Jessop* (1), where it appears to have been assumed that lapsed legacies would enure for the benefit of the second residuary legatee. The gifts of residue there were, the first to A. and the second to A. and B. It was unreasonable to suppose that a legacy lapsing by the death of A. could be intended to fall into residue for the benefit of A. herself and another. This being so, there was nothing that the second residuary legatee could take other than legacies which were given in priority to both residuary gifts and which lapsed. That is not the case here. I think that the lapsed legacies in the present case fall into the first gift of residue.

Solicitors for plaintiff: *Tarry, Sherlock & King, for Turner & Turner, Ipswich.*

Solicitors for defendants: *Mead & Co., for William Smith & Sons, Weston-super-Mare.*

(1) 11 Ir. Ch. Rep. 424.

F. E.

JOYCE J.

1905

Jan. 11;
Feb. 4.

MARSHALL *v.* JAMES.

[1902 M. 1253.]

Practice—Judgment Creditor—Garnishee Order Absolute—Mistake—Setting aside.

A garnishee order, made upon evidence afterwards proved to be mistaken, may be set aside although it has been made absolute and has been acted upon.

Moore v. *Peachey*, (1892) 66 L. T. 198, followed.

MOTION to discharge a garnishee order absolute.

The applicant, C. R. Witham, carried on business in partnership with the plaintiff under the firm name of Marshall & Co.

By an order made in this action and dated March 9, 1903, the plaintiff was ordered to pay to the defendant the sum of 33*l.* 11*s.* 9*d.* and costs, which were afterwards taxed at 47*l.* 7*s.* 2*d.*

This judgment being unsatisfied, on October 11, 1904, upon the application of the defendant, a garnishee order nisi was made by which it was ordered that all debts owing or accruing from W. H. Cullen and Teetgen & Co., Limited, to the plaintiff be attached to answer the sum which by the order of March 9, 1903, the plaintiff was ordered to pay to the defendant.

This order was duly served upon Cullen and Teetgen & Co.

On November 14, 1904, upon the application of the defendant, in the presence of Cullen's solicitors, Teetgen & Co. not appearing, the order nisi was made absolute, and Cullen and Teetgen & Co. were thereby ordered to pay to the defendant the sums of 13*l.* 9*s.* and 21*l.* 8*s.* 4*d.* respectively owing by them to the plaintiff.

This order was made upon an affidavit filed by the defendant's solicitor stating that the sums in question were owing by the debtors to the plaintiff.

In pursuance of the order Teetgen & Co. paid to the defendant the sum of 21*l.* 8*s.* 4*d.*; but before Cullen had complied with the order it was discovered that the debts alleged to be

due from him and Teetgen & Co. had in fact been contracted with and were due to the firm of Marshall & Co., and not to the plaintiff personally.

Witham now moved that the garnishee order be discharged, and that any moneys paid thereunder be repaid to the garnishees or to the applicant on behalf of Marshall & Co.

There was evidence that Cullen was unaware of the fact that Marshall had a partner, but Teetgen & Co. filed no evidence of mistake.

A. Lincoln Reed, for the applicant. The Court can under its inherent jurisdiction set aside any order which it has been induced to make by fraud or even innocent suppression of material facts. It can, therefore, set aside such an order as that now in question: *Moore* v. *Peachey*. (1)

R. Nevill, for the respondent James. In *Moore* v. *Peachey* (1) the application was by the garnishee on the ground of mutual mistake. That case does not apply here. A garnishee order absolute which has been acted upon cannot be set aside: *Burrell & Sons* v. *Read*. (2)

Reed, in reply. The Court will set right a miscarriage of justice at the instance of the party injured.

JOYCE J. (after stating the facts). No one has complained of the garnishee order as against Cullen except the applicant, who is the judgment debtor's partner. Cullen had good reason, in my opinion, for believing that Marshall had no partner. Cullen has not paid anything, but Teetgen & Co. have paid 21*l.* 8*s.* 4*d.* to James, the judgment creditor, who has thus obtained an amount which does not belong to him.

On the authority of *Moore* v. *Peachey* (1) and on general principles I have come to the conclusion that I must do what I can to remedy the injustice done by the garnishee order. In my opinion, there is no particular sanctity about a garnishee order, although it may have been made absolute and is so termed. I think the order as to Cullen must be set aside, but with no order as to costs.

(1) 66 L. T. 198.

(2) (1894) 11 Times L. R. 36.

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As to Teetgen & Co., the evidence is not complete. If they have made no mistake I cannot help them, but if it were proved that they had made a mistake like the bank in *Moore* v. *Peachey* (1) I should be disposed to help them.

I certainly think the defendant James is innocent, and I will give no costs against him.

[His Lordship having suggested a compromise, it was stated by counsel that the applicant, Witham, had agreed with James to receive in full satisfaction of the questions between them half the sum of 21*l.* 8*s.* 4*d.* which James had received from Teetgen & Co. His Lordship then continued:—]

I therefore discharge the order as regards Cullen, and, by consent, discharge it also as regards Teetgen & Co., on James undertaking to pay 10*l.* 14*s.* 2*d.* to Witham. There will be no order as to costs.

I will only add that I entirely dissent from the notion that a garnishee order absolute cannot be set aside.

Solicitors: *Hyman Isaacs & Lewis; Malkin & Co.*

(1) 66 L. T. 198.

G. A. S.

AINSWORTH *v.* WILDING.

JOYCE J.
1905
Jan. 13, 14.

[1890 A. 1085.]

Practice—Mortgagor and Mortgagee—Redemption—Mortgagee in Possession—Accounts—Sale of Part of the Mortgaged Property—Rents and Profits—Rests.

In a redemption action against a mortgagee in possession, who has from time to time sold parts of the mortgaged property, where a decree has been made directing the usual accounts and inquiries, but giving no direction as to rests, the mortgagor is not entitled to have rests made in the account of rents and profits even though there may have been sales from time to time.

Thompson v. *Hudson*, (1870) L. R. 10 Eq. 497, is not an authority against that proposition.

Wrigley v. *Gill*, ante, p. 241, followed.

THIS was an action for redemption by a second mortgagee against the first mortgagee in possession. The plaintiff asked for (inter alia) a declaration that a certain deed of charge dated October 7, 1877, and made between John Smith of the one part and Richard & John Wilding, his solicitors and financial agents, of the other part, ought to stand only as a security for the amount which, upon taking an account of all dealings between them on the principle of a current account, should be found due to the said John Wilding (the surviving partner of the firm).

For some time prior to 1877 the Wildings had acted as financial and business agents for Smith, for whom they obtained advances on the security of various legal mortgages, equitable charges, and promissory notes. In keeping and stating the accounts as between themselves and Smith, they had treated the relationship between them as that of principal and agent, and had credited and debited themselves with interest on all sums advanced to or received from him by themselves, treating the account as a running account.

By the above-mentioned indenture of October 7, 1877, Smith charged certain hereditaments situate in Blackburn and Little Harwood, in the county of Lancaster, and certain ground-rents with the payment to the Wildings of the sum of

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12,500*l.* therein alleged to have been advanced by them to him, with interest at 5*l.* per cent. per annum, but subject to the several incumbrances mentioned in a schedule thereto. In January, 1878, the Wildings gave Smith notice of their intention to sell the property comprised in the said deed. Smith then commenced an action against them for an account, redemption, and other relief. By an order made in that action and dated March 28, 1878, it was ordered that the deed of October 7, 1877, ought to stand as security for what was due at that date to the Wildings on the balance of accounts of dealings and transactions between them, with interest.

The account which they brought in was disputed on behalf of Smith by his solicitor, the plaintiff Ainsworth. By an indenture dated February 8, 1879, Smith charged the hereditaments comprised in the deed of October 7, 1877, but subject thereto and to the other charges therein mentioned, with the payment to Ainsworth on demand of the balance which should for the time being be owing on the account current of Smith with Ainsworth for money lent or advanced, and for interest at 5*l.* per cent. per annum. It was thereby agreed that the whole amount recoverable should not exceed 10,000*l.*, and Smith agreed to execute a legal mortgage in favour of Ainsworth.

John Wilding having, after the death of Richard Wilding, contended that Ainsworth was bound by the statement of account delivered in the action of *Smith* v. *Wilding*, the plaintiff disputed it, and commenced this action for the relief above mentioned.

By an order dated August 3, 1901, the Court declared that the deed of October 7, 1877, ought to stand as security for what was due at that date from Smith to Richard & John Wilding on the balance of account of dealings and transactions between them, together with interest from the date thereof. And it was ordered that the following accounts and inquiry be taken and made, that was to say—

(1.) An account of what, having regard to the above declaration, was due to the defendant John Wilding under and by virtue of the said security, and for his costs of the action up to and including the certificate to be made in pursuance of the

judgment; and it was ordered that the said account should be taken as an ordinary mortgagee's account;

(2.) An account of the rents and profits of the hereditaments comprised in the said mortgage dated October 7, 1877, received by the defendant John Wilding, or by any other person or persons by his order or for his use, or which without his wilful default might have been so received;

(3.) An inquiry whether any and what parts of the hereditaments comprised in the said mortgage of the 7th October, 1877, had been sold, and, if so, by whom and for what sums of money and by whom the purchase-moneys had been received, and how the same had been applied;

(4.) An account of the proceeds of any such sale received by the defendant John Wilding, or by any other person or persons by his order or for his use, or which without his wilful default might have been so received.

In pursuance of directions given by the master, the defendant Wilding on December 10, 1901, lodged in chambers his account as mortgagee in possession. This account shewed certain sums received by him as moneys arising on sales of parts of the mortgaged property effected by him as mortgagee, the balance of such sums after payment off of interest to be applied in payment off of the principal moneys. This balance was ascertained at half-yearly or yearly intervals by way of "rests."

The account also shewed certain sums received as rents and profits; and the plaintiff, among other objections to the account, contended, with regard to these items of rents and profits, that a balance of the same should be made out half-yearly or yearly, and that the balances from time to time should be set off as against the interest then due to the defendant in the same manner as the purchase-moneys were set off as against capital and interest.

The defendant disputed this contention, and submitted that the usual practice should be followed (as stated in form 1534 of Daniell's Chancery Forms, 5th ed. p. 773)—namely, to deduct the balance certified to be due from the mortgagee on the rents and profits account from the balance found due from the mortgagor on the principal and interest account, and to certify the ultimate balance, without taking any "rests."

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The master referred the matter to the Court under Order LV., r. 69, of the Rules of the Supreme Court, 1883.

Younger, K.C., and *O. L. Clare*, for the plaintiff. Rents and profits stand in the same position, with reference to their applicability in reduction of principal and interest, as proceeds of sale. Whenever there is a sale there should be a rest, and the total receipts from all sources should be set off against the amount then due for principal, interest, and costs.

This case comes within the principle laid down in *Thompson* v. *Hudson* (1), which is referred to by Warrington J. in *Wrigley* v. *Gill*. (2)

[They also referred to *Parr's Banking Co.* v. *Yates* (3) and Fisher on Mortgages, 5th ed. p. 849.]

Hughes, K.C., and *Austen-Cartmell*, for the defendant. Prior to the decision in *Thompson* v. *Hudson* (1) a mortgagee was only bound to bring proceeds of sale into account when the debt was paid off. It was held, in that case, that he must give credit for them at the time of the sale. That was the only point dealt with. Rents and profits were not in question there.

[JOYCE J. It appears from the contemporary reports of that case, and also from the registrar's book, which I have seen, that rents and profits were not brought in at all in that case.]

Yes. *Thompson* v. *Hudson* (1) is no authority on that point. Upon principle there is no logical basis upon which the argument for the plaintiff can be founded. There is no authority in favour of it, and, as pointed out by Warrington J. in *Wrigley* v. *Gill* (2), the practice is the other way. A mortgagee is not bound to accept payment by driblets. The reason is that he cannot invest so as to obtain interest. As regards the proceeds of sale that reason is absent, because they can be invested: *Nelson* v. *Booth*. (4) The account of rents and profits has always been treated as separate and distinct: Daniell's Chancery Forms, (1901) 5th ed. p. 773; Seton on Judgments, 6th ed. vol. iii. p. 1975; Robbins on Mortgages, vol. ii. pp. 1200, 1207, 1208; Fisher on Mortgages, 5th ed. p. 849, s. 1794.

(1) L. R. 10 Eq. 497.
(2) Ante, p. 241.
(3) [1898] 2 Q. B. 460.
(4) (1858) 3 De G. & J. 119.

Younger, K.C., in reply. So far as principle goes, the contention of the plaintiff has not been met. It is said that a mortgagee is not bound to accept payment by driblets; but where there has been a realization, thus giving an occasion for a rest in respect of proceeds of sale, then there ought to be a similar bringing into account of rents and profits. In *Wrigley* v. *Gill* (1) Warrington J. assumed that in a proper case rents and profits might have to be brought in. By realizing the property the mortgagee manifests his willingness to take what is due to him. The difficulty, therefore, of accepting payment by driblets is not present in such a case.

JOYCE J. This action of *Ainsworth* v. *Wilding*, as I understand it, is practically an action for redemption by a second mortgagee against the first mortgagee, and a decree was made by me on August 3, 1901, directing, with some directions immaterial for the present purpose, common accounts. That decree contained no direction for making rests, and I see no reason for adding such a direction now, even if it would be allowable for me to do so. The accounts have been brought in, and what has been done as to the sales of property has been this: the receipts from the sales have been brought in as debits against the mortgagee and credits to the mortgagor in the first account—namely, the account which is practically an account of what is due on the security, and brought in at the date of receipt.

Now what has been contended by the plaintiff has been this. He has started what to my mind is a new and ingenious theory, that whenever a mortgagee brings into account what he has received from a sale, a rest is to be made at that date in the account of rents and profits, so as to bring in any balance which would then be in the hands of the mortgagee from the rents and profits. No authority for this has been, or I believe could be, cited; but this was said to have been done in the well-known case of *Thompson* v. *Hudson* (2) and to be really involved in the decision in that case. Now the law or practice, whichever it be called, on this subject has recently been stated, and I think correctly stated, by Warrington J.

(1) Ante, p. 241. (2) L. R. 10 Eq. 497.

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in the case of *Wrigley* v. *Gill* (1), where he says that the practice is this (2): "The first account"—that is the account of what is due—"is treated as separate from the account of rents and profits. If money is received from an exercise of the power of sale, that money is credited to the mortgagor under the first account"—that is the account of what is due—"at the date at which it is received, but unless rests have been directed in the judgment the account of rents and profits following the usual rule, goes on without rests"; and later he says: "The ordinary rule is admitted that in the absence of special circumstances the account against a mortgagee in possession is not directed with rests—that is to say, the account of the rents and profits runs on from beginning to end without reference to the question whether he has at any particular time had in his hands more than sufficient to pay the interest or not, the reason being that a mortgagee is not bound to accept payment by driblets, but is entitled to have the account taken as a whole, and not to be treated as repaid until that account has been so taken."

Upon further investigation it turns out that *Thompson* v. *Hudson* (3) is no authority against what Warrington J. has stated. Certainly the question as to making the rest in the account of rents and profits does not appear from any of the reports to have been argued or even referred to. No doubt the Master of the Rolls does mention a very large sum as having been received—a sum so large that I suppose it was thought by some of the counsel, and by myself too at one time, that it must have consisted in great part of the receipts in respect of rents and profits. But on looking into the contemporaneous reports of the case, it appears in the report in the *Law Journal* (4), there having been two mortgages in this case of *Thompson* v. *Hudson* (3)—which is quite an immaterial circumstance—that, the interest on both mortgages being in arrear, the plaintiffs entered into possession of all the mortgaged property. The date of the entry into possession is given in the report in the *Weekly Reporter*. (5) I will read from p. 28 of 40

(1) Ante, p. 241.
(2) Ante, p. 253.
(3) L. R. 10 Eq. 497.
(4) 40 L. J. (Ch.) 28.
(5) 18 W. R. 1081.

L. J. (Ch.): "And from time to time, previous to May, 1861, sold portions of the Whitby estate, and applied the proceeds in reduction of interest on both mortgages, so as to leave in that month only about 1000*l.* due in respect of such interest." It appears that the plaintiffs had been in possession but a very short time. I conclude from these reports that the sum received consisted of receipts in respect of purchase-money of various lots of the Whitby estate, the aggregate of which sums so received as purchase-money, until the 21,600*l.* was received from the Albert Gate house, was less than the amount of the interest due by 1000*l.* If possibly it could be ascertained that any part of the amount received was received in respect of rents, there was no order that it was to be applied in reduction of interest, but the mortgagee himself gave credit for the amount. On the whole I see no reason whatever to suspect that there could have been anything of the kind—that is that there had been any receipt of rents at all. Taking that report alone, there is certainly no decision express or implied that what, if anything, had been received in respect of rents must be given credit for against interest at the date; and when we look at the order itself it is perfectly plain that no such order was made, because the only order made is: "His Lordship being of opinion that the sale moneys received by the plaintiffs from the sale of the mortgage properties are to be applied first in payment of interest, costs, and expenses due to them at the dates when such moneys were respectively received, and then in reduction of principal due at those dates respectively, refers the certificate back to chambers to vary."

It appears to me to be an entirely new theory that a rest is to be made in the account of rents and profits whenever—because it must go to that length—any sale of any kind has taken place of any part of the mortgaged property. In my opinion the objection raised to the account on this ground fails, and the account must be taken in the way I have stated without making rests, so that no rest is to be made in the account of rents and profits.

Solicitors: *Bower, Cotton & Bower; Robbins, Billing & Co.*

G. A. S.

SWINFEN EADY J.

1905

Jan. 11, 12; *Feb.* 3.

In re DOD'S CHARITY.

[1904 D. 0146.]

Charity — Commissioners — Jurisdiction — Exemption — Cathedral Church— Endowment for Minor Canons—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 62.

An endowment for the minor canons of a cathedral church, which is not part of the capitular estates, or under the control of or held in trust by the dean and chapter, is not an endowment of the cathedral church, so as to be exempt from the jurisdiction of the Charity Commissioners by virtue of s. 62 of the Charitable Trusts Act, 1853, even though the income indirectly relieves the capitular revenue pro tanto from payment of the minor canons' minimum statutory stipends.

In re Meyrick's Charity, (1855) 25 L. T. (O.S.) 92; 1 Jur. (N.S.) 438, distinguished.

PETITION.

By her will dated May 22, 1703, Barbara Dod made (inter alia) the following disposition of her property:—

"I give and bequeath unto Dean Fogg Mr. Wright and Mr. Langford prebendarys of the cathedrall church in Chester all of the county of Chester and their heires or such persons as shall succeed them in that cathedrall church as dean and prebendarys All my lands in the county of Cheshire except the land hereafter named devised In trust to the use and benefitt of these severall persons I shall nominate (that is to say) I doe for ever give and bequeath All my lands in Boughton and Childer Thornton in the county of Chester to the Six Clerks or Petty Cannons or Singing Men what other names you distinguish them by that doe officiate in the cathedrall church in the citty of Chester dureing their naturall life and continueing to officiate in that cathedrall church and to their successors that are thought fitt persons to officiate in that place that is to say my will and desire is that these six ministers that doe officiate in this place shall have paid them by equall shares and proportions the growing rents and yearly profitt of these my lands lying in Boughton and Childer Thornton aforesaid always provided that the persons chose in these severall places be in

priest orders And that every particular person of these doe in their turn preach a sermon on every Good Friday concerning the death and passion of Christ and therein sett forth the great and infinite love of Christ in dying to redeem mankind for which unspeakable mercy to him be glory for ever Amen Amen."

After bequeathing certain legacies the testatrix proceeded:—

"But it is my will and desire that all my debts and legacyes be paid before any of the persons I have left any lands to receive any profitt from it or any of the growing rents."

The testatrix appointed Gamull and Leftwich, a petty canon, her executors.

The testatrix died in 1703 seised of the lands lying in Boughton and Childer Thornton, but of no other lands in the county of Chester. The will was proved by the executors on July 29, 1703.

The petty or minor canons did not form a corporation. The dean and chapter, on the other hand, were constituted a corporation under a charter of 1541, with a common seal and licence in mortmain.

As soon as the debts and legacies were paid the rents and profits of the said lands, which were now let on yearly tenancies, were received by and applied to the support of the minor canons, in addition to stipends of 5*l.* 2*s.* a quarter paid by the dean and chapter in accordance with the cathedral statutes of 1544.

Under the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), s. 45, and an Order in Council of January 15, 1842, the number of minor canons was reduced to four, and the dean and chapter were required to provide that the stipends of the minor canons should not be less than 150*l.* each per annum, so that a total annual sum of 600*l.* was required for that purpose. There was no source of income for that purpose other than the said charity, and any deficiency was made good out of the revenue of the dean and chapter, to whom from the date of the said order annual accounts of the charity were rendered.

The property (which included a sum of 562*l.* New Consols)

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DOD'S CHARITY, *In re.*

in court, representing the proceeds of sale of lands taken by the Chester and Birkenhead Railway Company in 1850, only produced a net income of 320*l.* a year, which was being diminished by assessments for recent local improvements.

The dean and chapter were advised that an income exceeding 600*l.* a year could be obtained if the lands were sold in small portions or let on building leases.

The dean and chapter, therefore, presented this petition under the Charities Procedure Act, 1812 (52 Geo. 3, c. 101), commonly called Sir Samuel Romilly's Act, asking the Court to declare that on the construction of the will they were trustees of the charity, or if not that they might be so constituted and the necessary vesting orders made, and that a scheme for the administration of the charity should be directed.

The petition was served upon the minor canons, and upon the Attorney-General who gave his fiat; but the certificate of the Charity Commissioners was not obtained, as required by s. 17 of the Charitable Trusts Act, 1853, the petitioners being of opinion that the charity was exempted by s. 62, which provides that "This Act shall not extend to the universities of Oxford, Cambridge, London, or Durham, or any college or hall in the said universities of Oxford, Cambridge, and Durham, or to any cathedral or collegiate church . . . . Provided always, that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools."

Eve, K.C., and *Franey*, for the dean and chapter. The will should be construed as a devise to the dean and chapter, the exception being read "except that the land hereafter named is devised in trust" for the minor canons.

Any other construction renders the devise to the dean and chapter nugatory.

If the will is construed as a devise to the minor canons, it only passed an estate for their lives, and subject thereto the legal estate remained in the heir-at-law.

This defect should be set right and the charitable intention carried out by appointing the dean and chapter, who are a corporation and the governing body of the cathedral church,

trustees of the charity and vesting the property in them: *Reading Corporation* v. *Lane* (1); *Mayor of London's Case* (2); *Attorney-General* v. *Tancred.* (3)

The certificate of the Charity Commissioners is unnecessary, as every charity in which a cathedral church is interested is exempt from their jurisdiction under s. 62: *In re Meyrick's Charity.* (4) The founder's will is more fully stated in *In re "The Meyricke Fund."* (5)

The expression "cathedral church" is not confined to the building, but includes the deans, prebendaries, and ministers, and the endowments for their maintenance: *In re St. John Street Wesleyan Methodist Chapel, Chester.* (6)

Apart from the proviso at the end of the section, it would even include the schools: *In re Stockport Ragged, Industrial, and Reformatory Schools* (7); so that its meaning is extremely wide.

Now the dean and chapter are substantially interested in this charity, as the income relieves them pro tanto from their obligation to pay the stipends. They do not of course claim any surplus, but their indirect interest in being indemnified is sufficient to exempt the charity under s. 62.

Again, the minor canons cannot preach and so become entitled to the income without the consent of the dean and chapter; so that the charity is in this way under their control.

R. J. Parker, for the Attorney-General. As the Commissioners are not represented, it is my duty to state the objections to the petition.

On the construction of the will, the dean and chapter are neither trustees nor cestuis que trust, and until the order of 1842 they were not even indirectly interested in the charity. Accounts have no doubt been rendered since that date, but only to ascertain the deficiency for which they are liable. The minor canons are the only cestuis que trust, and are the proper persons to apply for a scheme.

(1) (1601) Duke on Charitable Uses, 361.
(2) (1639) Duke on Charitable Uses, 380.
(3) (1757) 1 Eden, 10.
(4) 25 L. T. (O.S.) 92; 1 Jur. (N.S.) 438.
(5) (1872) L. R. 13 Eq. 269.
(6) [1893] 2 Ch. 618, 630, 631.
(7) [1898] 2 Ch. 687, 699.

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Again, the certificate of the Charity Commissioners is necessary, even if the dean and chapter are trustees; a fortiori if they are not. The exemption in s. 62 only applies to the capitular property of the cathedral church.

It is not sufficient that the cathedral church should be indirectly interested; it must be a direct object of the charity. This is clear from the *Jurist* report of *In re Meyrick's Charity* (1), which is the report adopted in *Attorney-General* v. *Dean and Canons of Manchester*. (2)

In case of doubt the Court leans in favour of the Commissioners' jurisdiction: *In re Duncan* (3); and those who claim an exemption must make it out: *In re Clergy Orphan Corporation*. (4)

Hon. E. C. Macnaghten, K.C., and *MacSwinney*, for the minor canons, adopted the same arguments.

Eve, K.C., in reply. The cathedral church is a direct object of the charity.

A gift to a minister as such is a gift to his church or chapel: *Thornber* v. *Wilson*. (5)

A devise for the benefit of particular members of a college as such is a devise "to or in trust for" the college within the exemption of the Charitable Uses Act, 1735 (9 Geo. 2, c. 36, s. 4): *Attorney-General* v. *Tancred* (6); and it was evidently assumed in *In re Meyrick's Charity* (1) that a devise for the benefit of certain scholars and exhibitioners as such was a devise for the benefit of the college within s. 62 of the Charitable Trusts Act, 1853.

In the same way a devise to the minor canons virtute officii is really a devise to the cathedral church, of which they form part.

Cur. adv. vult.

Feb. 3. SWINFEN EADY J. The first question arising on this petition is whether, according to the true construction of the will of the testatrix, the dean and chapter of Chester

(1) 25 L. T. (O.S.) 92; 1 Jur. (N.S.) 438.
(2) (1881) 18 Ch. D. 596, 611.
(3) (1867) L. R. 2 Ch. 356, 359.
(4) [1894] 3 Ch. 145, 154.
(5) (1858) 4 Drew. 350.
(6) 1 Eden, 10.

Cathedral take any estate or interest in her real estate, which is the subject of this application. In my opinion the dean and chapter are not thereby constituted trustees of the real estate at Boughton and Childer Thornton. Assuming that the language of the will—namely, "I give and bequeath unto Dean Fogg, Mr. Wright and Mr. Langford, prebendarys of the cathedrall church in Chester, all of the county of Chester, and their heires or such persons as shall succeed them in that cathedrall church as dean and prebendarys"—is a sufficient description of the dean and chapter, the lands thereafter named (and which are the subject of this petition) are excepted from the devise to the dean and chapter, and are given and bequeathed "to the six Clerks or Petty Cannons or Singing Men, what other names you distinguish them by, that doe officiate in the cathedrall church in the citty of Chester, dureing their naturall life and continueing to officiate in that cathedrall church, and to their successors that are thought fitt persons to officiate in that place." These singing men, or minor canons, are not a corporation, and there are no words of limitation in the will, so that they took only an estate for life, and on their death the legal estate was vested in the heir-at-law of the testatrix. The dean and chapter take no estate or interest in it.

The next question raised before me is whether the dean and chapter are entitled to present this petition without first obtaining the certificate of the Charity Commissioners—that is to say, whether the charity constituted by the will of Barbara Dod is exempted from the operation of the Charitable Trusts Act, 1853, by the provision in s. 62 of that Act—namely, "This Act shall not extend to . . . . any cathedral or collegiate church." The petition has been served on the four minor canons, and they contend that they are the persons acting in the administration of the charity and the beneficiaries thereof, and that they are entitled to apply to the Charity Commissioners for a scheme, and that the dean and chapter, who are not trustees, and are not entitled to interfere in the management of the charity, cannot present this petition to the Court without the certificate of the Charity Commissioners. The

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Attorney-General, who has been served with the petition, also contended that the certificate of the Charity Commissioners was necessary.

Although the dean and chapter are not directly interested in the lands settled by the will of Barbara Dod, they are indirectly interested in the following way. Under and by virtue of the Ecclesiastical Commissioners Act, 1840, and an Order in Council pursuant thereto, dated January 15, 1842, they are required to provide that the stipends of the minor canons shall not be less than 150*l.* each per annum, so that a total annual sum of 600*l.* is required for this purpose. The minor canons have not any source of income other than the said charity, and any deficiency is made good out of the capitular revenues. If the income from the land in question can by judicious management and by granting building leases be raised to 600*l.* a year or upwards (and the petitioners allege that a larger income than 600*l.* can eventually be obtained), the result may be to relieve the dean and chapter altogether from any financial burden with regard to the stipends of the minor canons. In this manner and to this extent the dean and chapter are interested; but is an interest of this kind sufficient to bring the case within the exception contained in s. 62? In my opinion it is not.

It was also contended on behalf of the petitioners that, wherever a charity exists for the benefit of any class of ministers or officers within a cathedral church, such a charity is within the exception; and for this proposition reliance was placed on a passage in Kindersley V.-C.'s judgment in the *Law Times* report of *In re Meyrick's Charity*. (1) In that case the objection taken was that, as the funds which were the subject of the petition did not wholly belong to Jesus College, but another charity was or might be interested therein, the case was not within the exception. The Vice-Chancellor is reported to have said: "The purpose of that exemption (in s. 62) is that, so far as relates to an application to the court in respect of any charity in which the universities or colleges are interested, it shall be unnecessary so far as regards such

(1) 25 L. T. (O.S.) 92, 93; 1 Jur. (N.S.) 438.

universities or colleges, to go before the commissioners. The object of the present petition, though it may affect funds in which another charity is interested, is in effect one in which Jesus College alone is concerned." This report differs from the *Jurist* report of the same case, which is as follows: "The purpose [of the exemption] was, that so far as related to the application to the Court with respect to any charitable purpose of which the colleges or universities were the object, it should not be necessary to go before the commissioners. Now, here, the object of the petition, though it may affect another charity, is in effect an end of which the college alone is the object. . . . If it is to affect matters of which the college is the object, then you need not go before the commissioners; but if it is to effect an end of which another charity is the object, then it would be necessary to go before the commissioners." It is this latter report which was cited with approval by Hall V.-C. in *Attorney-General* v. *Dean and Canons of Manchester* (1), and, if any cathedral or collegiate church is the object of a charity, an application to the Court may be made with reference thereto, without any application to the Charity Commissioners.

The petitioners, however, are in effect seeking to extend this rule to all cases in which a minister or officer of a cathedral or collegiate church is interested in a charitable endowment. As was said by Lindley M.R. in *In re Stockport Ragged, Industrial, and Reformatory Schools* (2), s. 62 is a very obscure section; and, as the Court of Appeal pointed out in *In re Clergy Orphan Corporation* (3), it is for those claiming that they are exempt from its provisions to make out the exemption. In my judgment the petitioners have failed to do so. The exception of "any cathedral or collegiate church" cannot be interpreted so as to exclude from the operation of the Act every endowment in which any minister or officer of the cathedral is interested, nor so as to exclude from the operation of the Act this particular endowment of the minor canons.

By the Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), s. 18, the Ecclesiastical Commissioners are empowered

(1) 18 Ch. D. 596, 611. (2) [1898] 2 Ch. 687, 695.
(3) [1894] 3 Ch. 145, 154.

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under certain circumstances to make provision out of certain income "for securing adequate stipends and allowances to the minor canons, schoolmasters, organists, vicars choral, lay clerks, officers, choristers, bedesmen, servants, and other members of the cathedral or collegiate church." A large class of persons is here designated, and the argument of the petitioners is that, if a charity be established for any of these persons, that charity is outside the Charitable Trusts Act, although not within the jurisdiction of the Ecclesiastical Commissioners, unless the persons entitled constitute a corporation, when statutory powers are given of transferring the property to the Ecclesiastical Commissioners, on terms. I cannot construe the exception of "any cathedral or collegiate church" as extending to an endowment over which the dean and chapter have not any control, and which does not form portion of their capitular estates and is not held by them upon any trusts. I therefore direct the petition to stand over until further order, giving leave to the respondents to apply, in the event of the certificate of the Charity Commissioners not being obtained within a reasonable time.

Solicitors: *Tatham & Procter, for Barker & Rogerson, Chester; Woosnam & Smith, for Boydell & Taylor, Chester; Treasury Solicitor.*

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SIRDAR RUBBER COMPANY, LIMITED *v.* WALLINGTON, WESTON & CO.

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Jan. 23, 24, 25, 26; *Feb.* 18.

[1903 S. 4655.]

Patent—Infringement—Combination—Subject-matter—Repair—Fitting new Component Part.

A patentee invented a wheel rim of a particular shape which he claimed would hold a solid rubber tyre without pinching and without wires or bands for securing it. He claimed the rim, and also the combination of the rim and the tyre, but not the tyre. A rim would wear out many tyres.

The defendants having made and fitted a new tyre to one of the patentee's rims to replace a worn-out tyre, the patentee sued for infringement of the combination :—

Held, that, even assuming the patent for the rim to be valid, there was no subject-matter in the combination, as it was the only and obvious manner of using the rim and contained no separate merit or invention.

Clark v. *Adie*, (1877) 2 App. Cas. 315, 321, applied.

Held, also, that under the circumstances the defendants' acts only amounted to fair repair.

Dunlop Pneumatic Tyre Co., Ld. v. *David Moseley & Sons, Ld.*, [1904] 1 Ch. 612, 621, discussed.

Dunlop Pneumatic Tyre Co. v. *Neal*, [1899] 1 Ch. 807, distinguished.

WITNESS ACTION.

This was an action to restrain the infringement of the patent 11,686 of 1900 for "Improvements relating to Rims or Tyres for Vehicle Wheels." The plaintiff company were the equitable owners and the plaintiff MacLulich the legal owner of this patent.

The patentee had invented a rim of a particular shape which he claimed would hold a solid rubber tyre without pinching and without wires or bands for securing it. He claimed the rim, and also the combination of the rim and the tyre, but he did not claim the tyre separately. The rim was preferably made of metal.

The defendants having made and fitted a new tyre to one of the plaintiffs' rims to replace a worn-out tyre, the plaintiffs sued for infringement.

The defendants denied the validity of the patent on the ground that the patentee was not the true and first inventor,

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and also on the ground of insufficient specification, want of novelty, want of subject-matter in the rim, and want of subject-matter in the combination, and submitted that even if the patent were valid they had not infringed it by supplying and fixing the new tyre.

The arguments and judgment on the last two points are alone reported.

Moulton, K.C., and *A. J. Walter*, for the plaintiffs. The combination is of great utility and supplies a known want. That is sufficient subject-matter: *Edison and Swan Electric Light Co.* v. *Holland.* (1)

The defendants have infringed the combination. Of course they might repair the rim or the tyre. But they are not entitled to supply and fit an entirely new component part of the combination even by way of repair. That is making a new combination and amounts to infringement.

Bousfield, K.C., and *W. Neill*, for the defendants. Even if there is subject-matter in the rim, there is none in the combination. The only conceivable invention is in the rim. When that is made, the fixing of the tyre is obvious, and the patent cannot be enlarged by claiming such an obvious combination.

In any case the defendants' acts only amount to repair. They have merely replaced a worn-out tyre. They have not made a new article: *Dunlop Pneumatic Tyre Co., Ld.* v. *David Moseley & Sons, Ld.* (2); *Dunlop Pneumatic Tyre Co.* v. *Holborn Tyre Co.* (3); *Dunlop Pneumatic Tyre Co.* v. *Excelsior Tyre Cement and Rubber Co.* (4); *Dunlop Pneumatic Tyre Co.* v. *Neal.* (5)

If the plaintiffs wished to prevent outsiders renewing the tyres, they should have sold the combination with a limited licence, as they appear to have done in some instances: *Incandescent Gas Light Co.* v. *Cantelo.* (6)

Moulton, K.C., in reply.

Cur. adv. vult.

(1) (1889) 6 Rep. Pat. Cas. 243.
(2) [1904] 1 Ch. 612, 621.
(3) (1901) 18 Rep. Pat. Cas. 222, 226.
(4) (1901) 18 Rep. Pat. Cas. 209.
(5) [1899] 1 Ch. 807.
(6) (1895) 12 Rep. Pat. Cas. 262.

Feb. 18. SWINFEN EADY J., after holding that the patent was bad for insufficient specification, want of novelty, and want of subject-matter in the rim, continued:—If the patent is invalid there is an end of infringement; but, assuming the patent to be valid, have the defendants infringed it, and do they threaten and intend to infringe it in the future? The defendants have supplied a new rubber tyre and inserted it into an old rim of the plaintiffs' to replace the old tyre worn out. This was done bonâ fide, by way of repair. The plaintiffs contend that this is an infringement of their patent, although they concede that any one is entitled to make and sell rubber tyres to fit the rims. The infringement alleged is placing the tyre in the rim. This is done in a way which is old, and by use of machinery which is old, and by which all solid tyres of this kind are placed in metal rims. Have the defendants infringed the patent?

In the recent case of *Dunlop Pneumatic Tyre Co., Ld.* v. *David Moseley & Sons, Ld.* (1), Cozens-Hardy L.J. said: "I think, speaking for myself, that there may be a third class of cases in which the supply by the defendants might be perfectly lawful—I mean for the purpose of repair. The word 'repair' is no doubt a difficult one to construe, but I do not think that *Dunlop Pneumatic Tyre Co.* v. *Neal* (2) justifies the construction which was put upon it by the appellants' counsel. I certainly doubt—I will not say any more than that—whether the holder of a licensed tyre may not replace a worn-out cover without being guilty of an infringement of the patent. It is not necessary to decide that point now, and I only desire to keep that point open for future consideration."

I fully appreciate the difficulty felt by Cozens-Hardy L.J. in construing the word "repair"; but, in my opinion, it is a question of fact in each case whether the work which has been done may fairly be termed a "repair," regard being had in each case to the exact nature of the invention. The purchaser of a patented article has a right to prolong its life by fair repair, but he has not any right to obtain, without licence from the patentee, a substantially new article, made in accordance

(1) [1904] 1 Ch. 612, 621. (2) [1899] 1 Ch. 807.

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with the invention, retaining only some subordinate part of the old article, so that it may be said that the combination is not entirely new. Such a retention of an old part would be colourable only, and would not prevent the article from being substantially a new article, instead of being substantially a repair of the old one. This was the case of *Dunlop Pneumatic Tyre Co.* v. *Neal* (1), where North J. held that the tyre was really a new tyre; nothing was left of the old tyre but the wires, and one of these had been broken and was mended by the defendant. In the present case, assuming validity, the plaintiffs' real invention is a metal rim of a particular shape, to receive a rubber tyre; the soft wearing part is the rubber tyre, and in the nature of things the rim is calculated to wear out several tyres. Unless the purchaser is able to have new rubbers placed in the rim, he cannot obtain the use of the patented article for the fair period of its life. This is not a repair amounting to reconstruction, and a new article, but a fair repair; the old metal rim, the distinguishing feature of the invention, being retained, not colourably, but because essential and practically as good as new, and a fresh rubber put to replace the old one worn out. In my opinion, there has not been any infringement.

It may, however, be further urged that in the present case the patentee also claims as new "a wheel rim and solid rubber tyre constructed substantially as described," and that the defendants, by fixing the tyre in the rim, have assembled the parts, and made the plaintiffs' combination. But I cannot in any case regard this claim as valid, even if the patent were otherwise valid as regards the rim. No doubt there may be a valid patent for a combination, even though all the parts be old, but there must be novelty, invention, and merit in the combination to support validity. Where the only invention is in the form of one part of an article or machine, which part is separately claimed as an invention, the scope of the patent cannot be enlarged by claiming that part in every combination in which it can be used, however obvious. The patentee, having claimed the rim, cannot extend the scope of the patent

(1) [1899] 1 Ch. 807.

by claiming the rim in combination with a rubber tyre, as that is the only and obvious manner in which the rim is intended to be used, and there is no invention or merit in the combination apart from the novelty in the shape of the rim itself. If the patent be restricted to the form of the rim, it is obvious that the defendants have not infringed, and as that is all that the plaintiffs can claim to have invented, they cannot extend the ambit of the patent by an additional claim for a combination and so bring within it something as an infringement which would not have been an infringement if the patent had been for the rim alone.

It was pointed out by Lord Cairns L.C. in *Clark* v. *Adie* (1) that a patent may be granted for a larger invention and also for certain subordinate integers properly specified and claimed; but then the patentee "is, as was said by the Lords Justices, at the peril of justifying those subordinate integers as themselves matters which ought properly to form the subject of a patent of invention." I apprehend that the converse of this proposition also holds true, that, where a subordinate integer is specified and claimed and a larger combination of which this integer is part is also claimed, the patentee is at the peril of justifying the combination, as matter which ought properly to form the subject of a patent of invention; and he does not discharge this burden where there is no novelty or invention in the larger claim, but the combination is merely an obvious one, if the subordinate integer is to be used at all. [His Lordship, having held on the evidence that the patentee was the true and first inventor, continued:—]

The result is that the action fails and must be dismissed with costs, except that the plaintiffs must have the cost of the issue of the true and first inventor, and there will be a set-off.

Solicitors: *Shaen, Roscoe, Massey & Co.; Collyer-Bristow, Hill, Curtis, Booth & Co.*

(1) 2 App. Cas. 315, 321.

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SPARK'S LEASE, *In re.*
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to stipulate for a collateral advantage: *Bates* v. *Donaldson* (1); *Young* v. *Ashley Gardens Properties, Ld.* (2)

[SWINFEN EADY J. I agree; but here they are merely trying to retain their original position.]

Eve, K.C., and *Daniel Jones*, for the landlords. This is a pure question of fact—namely, Aye or no, is the licence unreasonably withheld? It ought not to be decided on summons.

Unless the landlords retain some control, the premises might be used for purposes which, though not forbidden by the lease, might affect them injuriously or depreciate the property. For instance, they might be assigned or underlet to a rival trader, or to a dressmaker or milliner employing many hands who would crowd the common entrance, and the landlords might even be obliged to provide separate entrances under the Factory Acts. It is not unreasonable for them to protect themselves against this: *Barrow* v. *Isaacs & Son* (3); *Bates* v. *Donaldson*. (4) The landlords are prepared to grant a licence conditional on the undertenant agreeing not to assign or underlet without the written consent of the tenant and themselves, such consent not to be unreasonably withheld.

SWINFEN EADY J. The actual licence that the landlords are prepared to grant must be put in writing, so that I may have the document before me. The case must stand over for this purpose.

The case then stood over, and the tenant and the landlords subsequently agreed on a licence on the condition that the landlords should be parties to the underlease and the undertenant should covenant not to assign or underlet without their written consent, such consent not to be unreasonably withheld, and that this licence should not authorize any further assignment or underletting. A draft underlease on these terms was subsequently approved by the tenant and the landlords, the undertenant also covenanting with the tenant

(1) [1896] 2 Q. B. 241.
(2) [1903] 2 Ch. 112.
(3) [1891] 1 Q. B. 417, 424.
(4) [1896] 2 Q. B. 241, 244.

as originally proposed. If the undertenant did not agree to these terms the matter was to be at an end.

1905. Feb. 21. The question of costs was left open, and the case came on again on that point only.

Martelli, for the tenant. The tenant has now conceded more than the landlords were entitled to, but the question of costs is left open. The landlords' requirements were in fact unreasonable at the date of the summons, and their consent was unreasonably withheld. The tenant is therefore entitled to the costs of the summons.

Eve, K.C., and *Daniel Jones*, for the landlords, were not called on.

SWINFEN EADY J. (after stating the facts). On the question of costs, which is now the only question before me, I have to decide whether or not the landlords were acting unreasonably in seeking protection against any further assignment or underletting without their written consent. As the landlords occupy a part of the premises, they are directly concerned with the use to which the remainder is put. It might be used for the business of a dressmaker or milliner employing many hands who would pass to and fro through the common entrance, and this might seriously depreciate the value of the landlords' premises. When a landlord occupies part of a building, and has let off another part with a covenant by the tenant not to assign or underlet without the landlord's written consent, such consent not to be unreasonably withheld, it is reasonable for the landlord, before granting a licence to underlet, to ask for what purpose the portion to be underlet is to be used, and to stipulate for a similar covenant between the undertenant and himself. The tenant's contention to the contrary is not well founded, and he must, therefore, pay the costs of the summons.

Solicitors: *Downey & Linnell; Boyce & Son.*

G. R. A.

WARRINGTON J.

1905

Jan. 11.

SITWELL *v.* EARL OF LONDESBOROUGH.

[1904 S. 2968.]

Settled Land—Mines—Reservation of Mining Rights—Support to Surface—Tenant for Life—Mining Lease—Lease of Power to let down Surface—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 10 (*iv.*); *s.* 6; *s.* 7, *sub-ss.* 2, 3.

A tenant for life of settled land has power under s. 6 of the Settled Land Act, 1882, to grant a lease of a right to let down the surface of the land by mining operations.

By his marriage settlement Sir G. Sitwell conveyed land of which he was owner in fee to uses under which he was now tenant for life. The deed contained an exception from the conveyance of all mines under the land in question with power to work the same; any person exercising these reserved rights was to make reasonable compensation to the trustees of the settlement for all damages caused to the inheritance, and also to the persons for the time being entitled to the surface of the land for damage to things upon the surface :—

Held, that Sir G. Sitwell had no power under the exception to authorize lessees to work the mines so as to let down the surface of the settled land; but that as tenant for life he could under s. 6 of the Settled Land Act, 1882, grant them a lease of a right to do so.

By his marriage settlement of July 11, 1888, Sir G. Sitwell, Bart., appointed and conveyed lands and hereditaments of freehold tenure except and reserved out of the appointment and conveyance thereby made all mines of coal and ironstone and other mines, whether opened or unopened, lying and being in and under the said premises, together with full power to work, get, carry away, sell, and dispose of the same, and to do all such acts and things upon, in, and under the said premises as should be necessary or expedient for all or any of the purposes aforesaid, but so nevertheless that no surface operations should be carried on within (1) of Renshaw Hall, and that no underground workings should be carried on within (1) thereof, and so that the person or persons exercising the rights and liberties thereby reserved should make reasonable compensation to the trustees or trustee for the time being of the said settlement (to be held by them or him as capital moneys arising from the exercise of the power of sale conferred on a tenant for life by

(1) Blank in the original.

the Settled Land Act, 1882) for all damages caused to the inheritance of the said premises by the exercise of such liberties, and also to the person or persons for the time being entitled to the surface of the said premises for all damage caused to growing crops or other things upon such surface, the amount of such compensation to be settled as therein mentioned, to the use of the said Sir G. Sitwell during his life without impeachment of waste, and after his death to certain uses therein set forth for securing a jointure rent-charge for his wife, and subject thereto to the use of the defendants the Earl of Londesborough and Sir William Henry Arthington Worsley for the term of 1000 years, upon trust for raising portions for the settlor's younger children, and subject thereto to the use of his first and other sons by his said wife successively according to seniority in tail male, with remainder to the use of the settlor, his heirs and assigns. By the settlement the defendants the Earl of Londesborough and Sir William Henry Arthington Worsley were appointed trustees thereof for the purposes of the Settled Land Acts, 1882 and 1884, and it was declared that no part of the rent reserved on any mining lease within the meaning of the Settled Land Act, 1882, which should be granted pursuant to the said Act or otherwise should be set aside as capital money, but the whole thereof should go as rents and profits.

At the date of the settlement Sir G. Sitwell was owner in fee of the lands thereby settled, and he afterwards purchased the fee simple of other lands and minerals adjoining the settled lands.

In November, 1903, he entered into a contract with the Rother Vale Collieries, Limited, to grant to that company a lease of the Barnsley seam of coal, lying partly under the settled land and partly under the land purchased by him, and to authorize the lessees to work the seam without leaving any support to the surface except where there were buildings.

The company raised the objection that he had no power to do this. Accordingly he took out a summons to determine the questions—

1. Whether upon the true construction of the above-

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mentioned settlement the plaintiff, as the person absolutely entitled to the mines and minerals in and under the hereditaments settled by the said settlement, had power to work or to authorize other persons to work such mines and minerals without leaving any support for the said settled hereditaments, or so as to let down or otherwise injure the surface of the said settled hereditaments.

2. If the plaintiff as the person so absolutely entitled had not such power, then that it might be declared that the plaintiff as tenant for life under the above-mentioned settlement had power to demise or grant to a lessee (in any lease made by himself as absolute owner of the said mines and minerals in and under the settled hereditaments) the right to work such mines and minerals without leaving any support for the said settled hereditaments, and to let down or otherwise injure the surface of the said settled hereditaments, and that it might be determined what rent ought to be reserved in respect of such right if granted.

With regard to the first point Warrington J. held, on the true construction of the settlement, that Sir G. Sitwell had no power to let down the surface under the reservation of minerals with power to work them. The law was laid down in *Davis* v. *Treharne* (1), and the fact that this was a marriage settlement and contained two different compensation clauses made no difference.

The second question was then argued.

Rowden, K.C., and *Bryan Farrer*, for Sir G. Sitwell. We now ask for a declaration that the plaintiff as tenant for life of the settled estates is entitled, under the Settled Land Act, 1882, to grant to the company a lease of a power to let down the surface. We cannot get any one to take a lease of the minerals unless we can give him this right. By s. 6, a tenant for life is authorized to lease any easement, right, or privilege over the settled land for any purpose whatever for any term not exceeding in the case of a mining lease sixty years. By s. 2, sub-s. 10 (iv.), a "mining lease is a lease for any mining pur-

(1) (1881) 6 App. Cas. 460, 467.

poses or purposes connected therewith, and includes a grant or licence for any mining purposes." The proposed lease of a right to let down the surface will be a grant for purposes connected with mining, and will, therefore, be a mining lease within s. 6. The right to let down the surface is an easement which is grantable by law, and any words which clearly shew the intention to give an easement which is by law grantable are sufficient to effect that purpose: *Rowbotham* v. *Wilson*. (1) Therefore, this right can be given by way of lease by a tenant for life under s. 6, and that lease may be for sixty years. A mining lease may include surface land necessary for the effective working of the minerals: *Re Reveley's Settled Estates*. (2)

H. Terrell, K.C., and *Hemmerde*, for the trustees. The proposed grant is not a lease at all. It is a surrender for a term of years of the right to support. That right is in the case of land a right of property, and in the case of buildings an easement: *Dalton* v. *Angus*. (3) In this case the settled land is the dominant tenement, and the right is not an easement. A grant of a right to destroy the surface is not a lease within s. 6.

By s. 7, sub-s. 3, every lease is to contain a condition of re-entry. It is not possible to re-enter on such a right as this; so no lease can be granted.

Even if it is an easement of which a lease can be granted within s. 6, the arrangement now suggested ought not to be carried out. The proposed rent is quite inadequate, and it is impossible to ascertain the best rent of such a right; whereas by s. 7, sub-s. 2, it is provided that every lease shall reserve the best rent that can reasonably be obtained.

No reply was called for.

WARRINGTON J. The question which I have now to decide arises upon the Settled Land Act, 1882. The question is whether the plaintiff as tenant for life is, under the provisions of the Settled Land Act, entitled to grant to lessees of his minerals the right to let down the surface of the land. The

(1) (1860) 8 H. L. C. 348, 362. (2) (1863) 11 W. R. 744.
(3) (1881) 6 App. Cas. 740, 791.

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material provisions of the Act are these. By s. 6, "a tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding . . . . (ii.) in the case of a mining lease sixty years." By the definition clause, s. 2, sub-s. 10 (iv.), "Mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purpose of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes." What is proposed is to grant to the lessees of the mines a right during the continuance of their lease so to work the mines as to let down or damage the surface of the settled land. It seems to me that, assuming the right so to do is within s. 6, then the purposes for which it is proposed to grant that right are mining purposes within sub-s. 10 (iv.) of the definition clause, and it only remains to consider whether such a right as it is proposed to grant is "an easement right or privilege" over the settled land within s. 6. What is the right which it is proposed to grant? It is a right to damage the surface. It is true that it is a right to damage the surface by underground workings, but for the purpose of construing s. 6 the source of the damage is immaterial. If the section allows, as I think it is plain that it does allow, a lease of a right to damage the surface either, for instance, by opening a pit and removing that part of the surface altogether, or by constructing a railway or tramway over the surface, which cannot be done without damaging part of the surface, it must, I think, also authorize the granting of a lease of a right to damage the surface in any other way. That that is so is shewn by *Rowbotham* v. *Wilson* (1), and particularly by a passage at p. 362. Lord Wensleydale says: "I do not feel any doubt that this was the

(1) 8 H. L. C. 348.

proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it; and it was admitted, at your Lordships' bar, that there is no authority to the contrary. It is undoubted law, that no particular words are necessary to a grant; and any words which clearly shew the intention to give an easement which is by law grantable, are sufficient to effect that purpose." That is sufficient authority for saying that a right to damage the surface, however the damage is caused, is a right which is grantable at law. If that be so, I see no reason why under the Settled Land Act a tenant for life should not be authorized to lease that right, and to lease it in a proper case for mining purposes.

It is said that it is impossible to ascertain the best rent. I do not follow that. The Act only says that the lease shall reserve the best rent which can reasonably be obtained. It may be a difficult question to decide, it may be a question for experts, but that such a rent could be ascertained one ought to have no doubt.

It was said that such a lease cannot comply with s. 7, sub-s. 3, as to a condition of re-entry. I do not think that can be maintained. Strictly, a condition of re-entry is only applicable to corporeal hereditaments. It is clear from the express words of s. 6 that a tenant for life has the right to lease incorporeal hereditaments. The two sections, therefore, must be read together, and s. 7, sub-s. 3, must be understood to apply only to a lease to which a condition of re-entry is applicable. I therefore hold that the tenant for life has power to grant the right in question for mining purposes.

Solicitors: *Arnold & Henry White.*

H. C. R.

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Jan. 13.

HILL *v.* FEARIS.

[1904 H. 2695.]

Partnership—Goodwill—Stockbroking Business—Dissolution—Asset of Partnership—Sale—Division of Assets.

H. and F. carried on business as stockbrokers in London under articles of partnership which contained no mention of goodwill. The term for which the partnership was constituted expired, and the business was carried on by them as partners at will upon the conditions of the articles so far as applicable. H. died, and F. continued to carry on the business. For this purpose he obtained the permission of the committee of the Stock Exchange to use the name of the firm. He accounted for H.'s capital, but declined to pay anything in respect of goodwill:—

Held, that the nature of a stockbroker's business was not such that there could not be a saleable goodwill thereof; and that, in the absence of any provisions to the contrary in the articles, the goodwill must be sold and the proceeds accounted for.

Wilson v. *Williams*, (1892) 29 L. R. Ir. 176, distinguished.

Previously to 1895 Thomas Bourne Hill had for some time carried on business at 29, Threadneedle Street as a stockbroker under the name of Hill, Fawcett & Hill. In that year he took into partnership the defendant Walter Bourne Fearis and his own son Charles Henry Bourne Hill. Articles of partnership were executed on May 18, 1895, whereby the partnership was to continue under the name of Hill, Fawcett & Hill for seven years at the present offices of the firm. The capital of the firm was to consist of 3500*l.* brought in by T. B. Hill, and 750*l.* brought in by each of the other partners. By clause 26 T. B. Hill had power to determine the partnership as regards C. H. B. Hill. Clause 27 was as follows: "In the event of the death of the said T. B. Hill during the partnership the same shall be continued by the surviving partners who shall pay to his executors or administrators any capital then standing to his credit beyond the said sum of 3500*l.* in addition to his share of profits to the date of his death and during the remainder of the term of seven years the executors or administrators of the said T. B. Hill shall also be entitled to receive in addition to interest upon his said capital of 3500*l.* at the

rate hereinafter provided one fourth part of the profits of the said business one other fourth part being paid to the said C. H. B. Hill and the remainder of the said profits to the said W. B. Fearis." Clause 29 provided: "Within three calendar months after the determination of the partnership by effluxion of time a full and general account in writing shall be taken by the partners of all moneys securities debts and effects then belonging to the partnership and of all moneys and debts due by and of the liabilities of the partnership and a just valuation shall be made of all the particulars included in such account which require and are capable of valuation and immediately after such last-mentioned account shall have been so taken and settled the partners shall forthwith make due provision for the payment of all moneys and debts then due by the partnership and for meeting all the liabilities thereof and subject thereto the capital of the partnership shall be repaid to the partners entitled thereto and the residue of the moneys debts and effects then belonging to the partnership shall be divided between the partners in the shares to which they are then entitled to the net profits of the partnership. And such instruments in writing shall be executed by the partners for facilitating the getting in of the outstanding debts and effects of the partnership and for indemnifying each other touching the premises and for vesting the sole right and property in the said respective shares of the said debts and effects in the party to whom the same shall upon such division belong and for releasing to each other all claims on account of the partnership as are usual in cases of the like nature." The partnership articles contained no mention of goodwill.

By a memorandum of January 4, 1899, indorsed upon the deed, it was agreed by the three partners that the partnership should, as regards C. H. B. Hill, be dissolved in all respects as if it had been dissolved under clause 26. After this time the business was carried on by T. B. Hill and Fearis, the former taking two-thirds and the latter one-third of the profits. C. H. B. Hill was appointed an authorized clerk of the firm, with power to draw and sign cheques on their account. The partnership would have expired by effluxion of time on May 20,

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1902, but the partners agreed that it should continue in force until May 20, 1903. From that date until the death of T. B. Hill on May 17, 1904, they carried on the business under the same name as partners at will upon the terms of the deed so far as applicable.

After the death of T. B. Hill, Fearis continued to carry on the business, with the sanction of the committee of the Stock Exchange, in the firm's name at the same premises. He had repaid T. B. Hill's capital, but declined to account for the profits since his death or to sell the goodwill. He alleged that there was no such thing as a goodwill of a stockbroker's business; that the partners as members of the London Stock Exchange were bound by the rules of that body; that he had since the death of T. B. Hill carried on the business as his own; that the name of the firm could only be used by permission of the committee, which he had obtained; and that if any goodwill existed it was not saleable.

In August, 1904, C. H. B. Hill, who was also a member of the Stock Exchange, offered 1000*l.*, which Mrs. Hill, the widow and executrix of T. B. Hill, intended to provide, for the goodwill of the business, but the defendant refused the offer.

Mrs. Hill brought this action against Fearis to have the affairs of the partnership wound up by the Court, and the assets, including the goodwill thereof, realized; accounts and inquiries; a declaration that the defendant must give credit for profits of the business since T. B. Hill's death, and the difference between 1000*l.* and the price ultimately obtained for the goodwill.

H. Terrell, K.C., and *R. J. Parker*, for the plaintiff. The defendant is bound to sell the goodwill of the business and account to us for the proceeds. If he carries on the business, he does so as trustee and not for himself only. An outgoing partner's estate is entitled to a share of the profits and of the assets: Lindley on Partnership, 6th ed. p. 592; s. 42 of the Partnership Act, 1890. The value of the goodwill is an asset of the partnership: *In re David and Matthews*. (1) The

(1) [1899] 1 Ch. 378.

question is whether there is any goodwill which is saleable. Goodwill involves a right to represent that you are carrying on the business of the firm, to solicit the customers of the old firm, to have the books of the firm, and to prevent anybody else from saying that he is carrying on the business. That is quite apart from the right to use the name of the firm. Provided that the purchaser of the goodwill is willing to take the risk, it is of no consequence that there is a rule which restricts the right to use the name. The defendant has to prove that the goodwill of a stockbroker's business belongs to the surviving partner and is not saleable. In this case a bonâ fide offer has been made to buy the goodwill for 1000*l.*, so it cannot be of no value. Clause 29 of the articles of partnership provides for getting in the effects of the partnership on a determination of the partnership by effluxion of time. The articles do not mention goodwill.

Gore-Browne, K.C., and *Willoughby Williams*, for the defendant. There is no saleable goodwill of the business of a stockbroker practising on the London Stock Exchange: *Wilson* v. *Williams*. (1) There can be no goodwill, for by the rules of the Stock Exchange no one but the defendant can use the name of the firm. Goodwill is not mentioned in the partnership articles and has not been treated by the partners as an asset; therefore it ought not to be considered an asset on a dissolution: *Steuart* v. *Gladstone*. (2) The relationship between a stockbroker and his client is purely personal. It is not the fact that every business has a goodwill. For instance, there is no goodwill of a solicitor's business: *Austen* v. *Boys* (3); *Arundell* v. *Bell*. (4) No doubt there generally is a goodwill of a business, and *In re David and Matthews* (5) applies to those cases only.

On the facts of this case the plaintiff cannot succeed. C. H. B. Hill and the defendant are both members of the Stock Exchange and bound by its rules. They cannot take legal proceedings against each other, nor use the name of the firm

(1) (1892) 29 L. R. Ir. 176.
(2) (1879) 10 Ch. D. 626.
(3) (1858) 2 De G. & J. 626.
(4) (1883) 52 L. J. (Ch.) 537.
(5) [1899] 1 Ch. 378.

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without permission. That permission is almost invariably given to the surviving partner. A purchaser of this goodwill could not use the name of the firm, so it would be of no value to him.

There is no mention of goodwill in the deed. In *In re David and Matthews* (1) the word "effects" was held to include goodwill, but the facts in that case were quite different: the effects consisted of securities, and there was no special custom or rule. Clause 29 of this deed provides for division of the assets, not for realization: *Banks* v. *Gibson*. (2) The offer to buy the goodwill does not make it an asset if it is not so otherwise. The premises in which the business has been carried on are held from year to year at a rack-rent. They are too expensive and must be given up. There is no goodwill attached to them. T. B. Hill's capital has all been repaid to his estate, so the plaintiff is not entitled to subsequent profits.

H. Terrell, K.C., in reply. All these old cases have been overruled. At one time it was held that the goodwill belonged to the surviving partner: *Hammond* v. *Douglas*. (3) Then that it was attached to the premises: *Cruttwell* v. *Lye*. (4) Now the whole question is covered by *Trego* v. *Hunt* (5), where goodwill is defined. It depends on the nature of the business, and is the whole advantage whatever it may be of the reputation and connection of the firm. *Wilson* v. *Williams* (6) followed *Pearson* v. *Pearson* (7), which was overruled by *Trego* v. *Hunt*. (5) *Banks* v. *Gibson* (2) was decided on special circumstances: Lindley on Partnership, 6th ed. p. 447.

There is nothing in the partnership articles which applies to a dissolution in the events which have happened. The general law applies, and ss. 39 and 44 of the Partnership Act, 1890, imply that all the assets must be realized.

[He was stopped by the Court.]

(1) [1899] 1 Ch. 378.
(2) (1865) 34 Beav. 566.
(3) (1800) 5 Ves. 539; 40 R. R. 168, n.
(4) (1810) 17 Ves. 335, 346; 11 R. R. 98.
(5) [1896] A. C. 7.
(6) 29 L. R. Ir. 176.
(7) (1884) 27 Ch. D. 145.

WARRINGTON J. The dispute in this case is between the executrix of a deceased partner and a surviving partner, and for the purposes of my present judgment it resolves itself into a question whether amongst the assets of the partnership for the purpose of winding up is to be included the goodwill. For the purpose of answering that question one must necessarily consider in the first place what is meant by the expression "goodwill," and fortunately I am able to turn to a recent decision of the Court of the highest authority in this country for the solution of that question. In *Trego* v. *Hunt* (1) the learned Lords before whom that case came all expressed their opinion as to what is meant by goodwill. The speech which I prefer to turn to for the purpose of quotation is that of Lord Macnaghten, and the particular passage begins at the bottom of p. 23. He says: "Generally speaking, it means much more than what Lord Eldon took it to mean in the particular case actually before him in *Cruttwell* v. *Lye* (2), where he says: 'The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place.' Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money." Lord Herschell expresses the same thing in rather different words. At the bottom of p. 17 he says this: "It is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business." I summarize that by saying, the goodwill of a business is the advantage, whatever it may be, which a person gets by continuing to carry on and being entitled to represent to the outside world that he is carrying on a business which has been carried on for some time previously. That seems to me to be the meaning of "goodwill."

Now, to apply that to the present case, the facts are simple enough. [His Lordship stated them.] The defendant has

(1) [1896] A. C. 7. (2) 17 Ves. 335, 346; 11 R. R. 98.

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continued the business since the death of Thomas Bourne Hill in the old firm name, and he insists that he is entitled to carry on the business under that name, and that there is no goodwill which can be sold, and therefore nothing which could go to a purchaser or be credited to the estate of Mr. Thomas Bourne Hill. Is that contention right? It is put in two ways. It is said first of all that in a stockbroker's business there is no such thing as goodwill, and that contention again divides itself into two parts. It is said that there is no such thing as goodwill in a stockbroker's business, first, because of the nature of the connection between the stockbroker and those with whom he does business. That I do not quite follow. I agree that in many cases it may be that the relation between the client and the broker is of such a nature that the client would not go with his business to the successor in business of the broker; but, on the other hand, there are many cases which one can conceive in which the client, not knowing who to go to, if he knew that his old broker had a successor might well give that man a trial, and see whether he would continue to employ him or not. I can quite imagine that the successor in business of the old broker might, using the expression in *Trego* v. *Hunt* (1), get an advantage in that way by being able to represent that he was carrying on the original business. It seems to me, therefore, that that branch of the argument fails—that it is impossible to say that the advantage derived from the connection may not be of some pecuniary value. Then it is said that in the case of stockbrokers in London or elsewhere, members of the London Stock Exchange, the goodwill of a business can have no saleable value, because if the purchaser of a business wishes to carry it on under the original name he can only do so by the permission of the committee of the Stock Exchange. That may be; but again it may not be essential to the advantage, which I have just pointed out may accrue to the successor or person entitled to represent himself as the successor, to be able to say that he is using the old name or trading under the old name. He may be able to represent to clients that he is

(1) [1896] A. C. 7.

the successor in the business, and get such advantage as there may be arising out of the connection without saying that he is entitled to carry on the business in the old name. But it is said, farther, not only would the successor not be entitled according to the rules of the Stock Exchange to use the old name for the purposes of the business, but that the old partner would be entitled to use that name, and, therefore, that the ordinary rule of law which would exclude a surviving partner from using the name of the firm as against the purchaser of the goodwill would be excluded from this particular partnership by reason of that rule of the Stock Exchange. There again I do not follow. The Stock Exchange committee makes a practice as a general rule of giving to the surviving partner, and to him alone, the right of using the name of the firm; but, as one of the witnesses told me, if a case arises in which the surviving partner is by agreement between himself and his co-partners precluded from using that name, it does not at all follow that the committee of the Stock Exchange, which has absolute discretion in the matter, would allow him to use it. Therefore I cannot go so far on the evidence which I have heard as to hold that the fact that there are rules, or that there is a practice of the committee of the Stock Exchange, in reference to the use by a successor of the name of the original firm, is sufficient to enable the Court to say that in the case of a London stockbroker, a member of the Stock Exchange, there is no such thing as a saleable goodwill.

But I am pressed with authority, and I am referred to a case in Ireland, *Wilson* v. *Williams* (1), in which it was decided that in the case of stockbrokers there was no such thing as goodwill. In the first place, I do not think the Vice-Chancellor who decided that case intended to lay down a rule of law. On the contrary, at the conclusion of his judgment he said (2): "The question is one of mixed law and fact. Without going so far as to lay down any hard and fast rule as to stockbrokers' business being, in every case, incapable of goodwill, I hold that in this case there is no saleable goodwill." He, therefore, carefully abstained from laying down any rule which would

(1) 29 L. R. Ir. 176. (2) 29 L. R. Ir. 184.

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bind a judge in another case on a different consideration of facts. But I think I may go further, and say that I am not at all satisfied that the Vice-Chancellor would have decided as he did if he had had before him the speeches of the learned Lords in *Trego* v. *Hunt*. (1) I think he decided this case on notions of goodwill which were not quite so wide as those which have now been laid down. That that was the idea in the Vice-Chancellor's mind I think is shewn by a passage at the bottom of p. 181. He says: "On a dissolution any of the partners may, unless expressly prohibited by contract from doing so, carry on the same business as before and use the old name of the firm and solicit the customers to deal with them." I do not think he would have said that if he had had in his mind the decision in *Trego* v. *Hunt* (1), which referred not only to the using of the name, but the soliciting of customers to deal with the purchaser, and renders that, on a sale of the goodwill, an unlawful thing for any one of the partners to do. I think, therefore, that while I should if it were applicable treat *Wilson* v. *Williams* (2), although it is not binding on me, with the utmost respect, yet even if it had been an English decision I should not have considered it applicable to the present case, or one which I should be bound to follow.

The result is, therefore, that, dealing with the matter without reference to the partnership articles, I cannot come to the conclusion that there is no advantage arising from the connection and the business of the old firm, and, therefore, that there is nothing that can be treated as a saleable goodwill. I do not for this purpose attribute much importance to the offer made of 1000*l*. I cannot regard that as an offer made by an outsider. It was really made by the plaintiff, the executrix. She said in one of her earlier letters that she desired to purchase the goodwill for her son, and it is common ground that she was going to provide, or at all events advance, the money with which the purchase was to be made; but quite independently of that offer, I cannot hold that there is nothing to which a saleable value can be attributed.

It is said, secondly, that by the contract in this particular

(1) [1896] A. C. 7. (2) 29 L. R. Ir. 176.

case the sale of the goodwill, which I must now assume does exist, in the events which have happened, is precluded by the articles of partnership. That is a question of construction. The articles contain only one provision which really bears, even if that can be said in strictness to bear, upon the present question. That is clause 29. [His Lordship read it.] Now it is said by the defendant that that clause does not contain any reference to the goodwill, which of course is true to this extent, that goodwill is not mentioned in it; but it is said, further, that it provides only for division, and that as goodwill is a thing not capable of division I must hold that the parties did not intend to take goodwill into account on the final dissolution of the firm. Now, it seems to me, there are more answers than one to that contention. In the first place, I refer to a passage in Lindley on Partnership, at p. 447, which I think correctly expresses the law. That passage is in these terms: "If then the goodwill of a partnership business has any saleable value at all, it seems impossible to hold that on a dissolution of a partnership, whether by death or otherwise, any partner can continue the old business in the old name for his own benefit, unless there is some agreement to that effect, or at least to the effect that the assets are not to be sold. Such a right on his part is inconsistent with the right of the other partners to have the goodwill sold for the common benefit of all." Now I take the result of that to be that it is the right of the other partners to have the goodwill sold, unless there is an agreement to the effect that the goodwill as part of the assets is not to be sold. Now is that the effect here? In my judgment, the real effect of this clause is not only not to exclude the goodwill, but not to exclude any of the assets from sale. It seems to me that for the purpose of working out clause 29 it might be impossible to effect what is here only referred to as a division without a sale. But it does not say that the assets are to be divided in specie. It only says the assets are to be divided. Now it is impossible to divide the assets without some further agreement. No partner would be entitled to take any specific asset, and some assets might be incapable of actual division. In such a case as that some agreement for division must be come to, or the

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division cannot be carried out except by sale. That seems to me to be the case with the goodwill. The goodwill is an asset of such a nature that the only division that can be made of it is by means of a sale. Again, supposing that the particulars enumerated in clause 29 in the description of the assets do not comprise goodwill, then what happens? There is a provision in the partnership articles for a division of part of the assets of the firm. That leaves the distribution of the remainder of the assets of the firm not included in that particular clause to be dealt with by the ordinary law—that is, to be sold and the proceeds to be divided. I cannot, in short, read clause 29 as indicating that the parties intended to exclude from the assets of the firm on the final dissolution any consideration of goodwill.

Now, although I do not desire to rely upon it at all, I think it is quite possible to rest the case on another ground, namely, that, having regard to the facts that have happened, this partnership has not expired by effluxion of time within the meaning of clause 29, but that clause 29 contemplated the survival at the time when the division is supposed to take place—that is, at the expiration of the seven years—of both the partners, and not a determination of a partnership at will constituted subsequently to that created by the deed and coming to an end, not expiring, but determining by the death of one of the partners. I think it is quite possible that, if that is so, in the event which has happened, there is no provision at all for a distribution of the assets on the winding-up, which has happened. Then the ordinary law will apply, which will involve the sale of such of the assets as the partners may not agree to divide and the distribution of the proceeds among the partners. In either case it seems to me there is nothing in these articles which prevents the goodwill being sold and the proceeds properly divided between the partners.

I may say that I do not think *Steuart* v. *Gladstone* (1) applies to the present case. The question that arose there was whether having regard to the practice of the partners in that case, and having regard to the ordinary practice of mercantile men, the

(1) 10 Ch. D. 626.

value of the goodwill was to be taken into account in the periodical accounts. I am not at all satisfied, looking at the judgment of Sir George Jessel in that case, that if he had had to deal with the question of goodwill at the expiration of the partnership he would have dealt with it in the way in which he dealt with it in the case before him, because he does in that case point out that there may be some value in the name of the firm there concerned, Gillanders, Arbuthnot & Co., which was a well-known name in India. With regard to *In re David and Matthews* (1), that, so far as it goes, supports the opinion which I have expressed as to the construction of the partnership articles, and I need not, therefore, say anything more about it.

I hold that in winding up the affairs of this partnership the goodwill must be treated as one of the assets of the firm, and must be realized with the other assets of the firm.

Solicitors: *James Robinson; Morley, Shirreff & Co.*

(1) [1899] 1 Ch. 378.

H. C. R.

C. A.
1904
Nov. 28.

CARROLL *v.* GRAHAM. (1)

[1865 C. 124.]

Practice—Appeal—Will—Construction—Trustees served with Notice of Appeal —Appearance by Counsel—Costs—Taxation.

Per Romer and Cozens-Hardy L.JJ.: Although it is the settled practice that trustees served with notice of an appeal upon the construction of a will are entitled to their costs of appearance by counsel, yet, in taxing their costs of appearance, the taxing master should have regard to the position of the trustees, and especially whether it was such that, at the hearing of the appeal, their assistance would probably be required by the Court:—

Per Vaughan Williams L.J.: Trustees served with notice of appeal and holding a merely neutral position, without any intention of taking part in the argument, ought not to appear by separate counsel on the appeal.

THE above action was for the administration of the estate of a testator, William Carroll, who died in 1851.

In 1867 an administration decree was made, under which a fund representing the testator's residuary personal estate was paid into court in the action.

By an order made in the action in 1903, two persons who had, in 1902, been appointed administrators de bonis non of a deceased beneficiary interested in the residuary estate of William Carroll, obtained an order to carry on the proceedings as plaintiffs. They then presented a petition in the action with a view to ascertaining the title of various claimants to the fund in court. The question of title depended upon the construction of the will of William Carroll, the terms of which were very obscure. Swinfen Eady J. decided against one of the claimants, who thereupon appealed.

The notice of appeal was served upon the successful claimants, and also upon the plaintiffs.

Eve, *K.C.*, and *Vaughan Hawkins*, for the appellant.

Mark Romer, for the respondents, the other claimants, was not called upon.

(1) The publication of this report has been delayed by the reporter's illness.—F. P.

THE COURT (Vaughan Williams, Romer and Cozens-Hardy L.JJ.) adopted the construction of Swinfen Eady J., and dismissed the appeal.

J. F. Popham, who appeared for the plaintiffs, but did not take any part in the argument, then asked for his costs of appearance according to the usual practice in the case of trustees or other persons standing in a fiduciary position.

VAUGHAN WILLIAMS L.J. I protest each time such an application is made on behalf of trustees, but my protest seems unavailing.

ROMER L.J. The practice is settled, I am afraid, and it is too late to alter it. But what my Lord means is that trustees ought not to appear upon an appeal unless they think it likely that they may be called upon to assist the Court. I have no doubt that the taxing master will have regard to the position of the trustees in the present case in taxing the costs. Beyond that we cannot go. The trustees were not expected to have to take part in the argument, and, therefore, I do not suppose the fee is excessive.

COZENS-HARDY L.J. I agree with what has been said by Romer L.J.

VAUGHAN WILLIAMS L.J. I do not think that mere neutrality should be supported by separate counsel. If the trustees personally have anything to say in the matter, well and good: then let them be represented by separate counsel. But I cannot understand why trustees who are absolutely neutral should appear here by separate counsel.

[Their Lordships, in dismissing the appeal, ordered that the appellant should pay to the respondents, including the plaintiffs, their costs of the appeal, such costs to be taxed by the taxing master.]

Solicitors: *Farrer & Co.; Cunliffes & Davenport.*

G. I. F. C.

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Dec. 8, 9, 13, 14, 15.

KINE *v.* JOLLY. (1)

[1903 K. 253.]

Light—Obstruction—Ancient Lights—Nuisance—Cause of Action—Injunction or Damages.

In an action for obstruction of ancient lights by the owner and occupier of a suburban dwelling-house it appeared that the room principally affected was lighted by two windows, one of which only was obstructed by the defendant's building, and that as to that there was still left more than 45° of light. Kekewich J. found that although the room was still well lighted there was a large obstruction of light by reason of the defendant's building, and that the letting and selling value of the plaintiff's premises had been substantially diminished, and he held that the obstruction constituted an actionable nuisance within *Colls* v. *Home and Colonial Stores, Ld.*, [1904] A. C. 179, and granted a mandatory injunction:—

Held, by the Court of Appeal (Romer L.J. dissenting), that the plaintiff had a cause of action, but that the remedy ought to be damages.

Held, by Romer L.J., that the plaintiff had no cause of action.

Per Vaughan Williams L.J.: The effect of *Colls* v. *Home and Colonial Stores, Ld.*, is that in order to support an action of nuisance by obstruction of ancient lights the obstruction, in the case of a dwelling-house, must be such as sensibly to interfere with the comfortable and convenient occupation of the plaintiff's premises according to the ordinary notions of the citizens of this country, and in determining that question the quantity of light coming from other sources is to be taken into consideration; but the mere fact that the quantity of light finding access to a particular room after an obstruction amounts to a sufficiency for the purpose for which the room was designed will not necessarily exclude the conclusion that the obstruction has interfered with the comfort and convenience or usefulness of the room according to the ordinary notions of mankind.

Per Cozens-Hardy L.J.: *Semble*, *Colls* v. *Home and Colonial Stores, Ld.*, only decides that an obstruction which neither lessens the letting or selling value of the house, nor materially affects the comfort or convenience of the occupier, does not in law justify an action, even though a large proportion of light previously enjoyed has been lost.

APPEAL from a decision of Kekewich J.

The action was brought for an injunction and damages in respect of an alleged obstruction of ancient lights.

The plaintiff Mrs. Kine was the owner and occupier of a freehold detached dwelling-house situate in Acacia Road, Acton,

(1) The publication of this report has been delayed by inevitable accident.—F. P.

and known as "Woodthorpe," and by her statement of claim she alleged that the defendant had recently built a house which materially obstructed the access of light to two windows on the ground-floor of her house on the west side thereof, and that the windows in question were ancient lights. The defendant admitted that the lights were ancient, but denied the obstruction.

At the trial of the action Kekewich J. granted a mandatory injunction in respect of both windows, but suspended the injunction pending an appeal. Before the appeal came on for hearing the House of Lords had delivered judgment in *Colls* v. *Home and Colonial Stores, Ld.* (1), and in these circumstances the Court of Appeal, being of opinion that the issues to be tried had been materially altered, remitted the action to the judge for retrial.

The undisputed facts were as follows:—

The plaintiff, who was a widow, purchased Woodthorpe in 1900, and had since resided there with her daughter and son-in-law.

The front of the house looked on to Acacia Road and faced south. The house was approached by a carriage drive, and the main entrance to the house was on the west side. On the same side of the house to the south of the hall-door was the drawing-room, which was lighted by a large bow window facing south and a smaller window facing west; and to the north of the hall-door there was a smaller sitting-room about 14 ft. by 13 ft. 7 in., hereinafter called the morning-room, which was lighted by two french windows of the same size, namely, 8 ft. 8 in. high and 4 feet wide, one looking west and the other looking north. It was in respect of the obstruction of the light to the west windows of the drawing-room and morning-room respectively that Kekewich J. had granted a mandatory injunction.

The hall-door above referred to was fitted with glazed panels, and was surmounted by a fanlight or window which lighted the entrance-hall. At the first trial no relief was asked in respect of these lights, but at the second trial the plaintiff obtained

(1) [1904] A. C. 179.

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leave to amend her statement of claim by including them in her claim.

At the time when the plaintiff purchased the house it was bounded on the west by an open field; but the plaintiff had notice that the house had been built between twenty and thirty years ago upon one of a series of building plots, and that the adjoining land was likely to be built on. In October, 1902, the adjoining land was purchased by the defendant, who built thereon for his own occupation a dwelling-house similar in character to the plaintiff's house. This house was completed in the spring of 1903. The east wall of the defendant's house was approximately 27 feet from the west wall of the plaintiff's house and parallel thereto, but it did not extend either to the north or to the south so far as the west wall of the plaintiff's house, and the position of the defendant's wall was such that, although it directly faced the greater part of the west window of the morning-room above referred to, it did not cover the whole area of the window, but left a narrow vertical strip of window to the north not directly obstructed. As regards that part of the window which was directly obstructed, there was still left to the plaintiff more than 45° of unobstructed light.

At the second trial expert witnesses were called on both sides with respect to the depreciation in the lettable and saleable value of the plaintiff's house by reason of the alleged obstruction to her ancient lights. Their evidence was conflicting. The plaintiff's witnesses estimated the depreciation in the letting value at from 20*l.* to 25*l.* a year, and in the selling value at from 375*l.* to 450*l.* The defendant's witnesses denied that the obstruction had caused any material diminution at all in the letting or selling value of the house. The effect of the evidence as to the amount of obstruction and as to the diminution in the letting and selling value of the house is stated hereafter in the summary of Kekewich J.'s judgment.

Kekewich J. held that the plaintiff had no cause of action in respect of the obstruction of light to the drawing-room; and he also came to the conclusion that as regards the light to the hall, taking it alone, there was no actionable obstruction; but

he held that a nuisance had been created by the obstruction of light to the morning-room plus the obstruction of light to the hall, and that damages afforded no adequate compensation for that nuisance. Accordingly he ordered the defendant to pull down so much of his house as caused a nuisance to the plaintiff by the obstruction of light to the windows of the morning-room and hall, and gave the plaintiff the costs of the action. Dealing with the evidence as to the obstruction of light to the morning-room, his Lordship said: "The great cause of complaint has been of the obstruction of light to what has been called the morning-room. It was an exceptionally well-lighted room, and even now is well lighted; so that if the test were whether there is sufficient light left to enable the room to be used for the purposes for which it was designed there would be no further question. As I understand the judgments in the House of Lords that is not the test, though it is a matter for consideration . . . . That there has been a large obstruction of light by the erection of the defendant's house is abundantly clear, and I think it is also clear that there has been a large interference with the cheerfulness of the room. . . . I am convinced that the character of the room is altered, and that though still a well-lighted room, it has lost in the obstruction of light one of its chief charms and advantages." His Lordship continued: "In determining whether this is a nuisance or not, I must take into consideration all the surrounding circumstances, not forgetting that the plaintiff purchased the house with the knowledge which must be imputed to her that it was one of a projected row of houses, and that sooner or later there was sure to be erected on the adjoining plot then vacant another house which was not unlikely to be of a size and character similar to her own. Having given all these circumstances full consideration, I have come to the conclusion that the obstruction of light to the morning-room is a nuisance within the meaning of the authorities on that subject." His Lordship then dealt with the form of relief, and came to the conclusion upon the expert evidence that the damages could hardly be less than 300*l.* or 400*l.*, and in the circumstances of the case he thought that that was a

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cogent argument against the adequacy of damages as a remedy. He therefore granted a mandatory injunction in the terms above stated.

The defendant appealed.

Hughes, K.C., and *W. E. Vernon*, for the defendant. We submit (1.) that the plaintiff has no cause of action; (2.) that if there is a cause of action this is a case for damages only, and not for a mandatory injunction.

1. In order to entitle the plaintiff to maintain this action the obstruction to light must constitute a nuisance, and in determining what constitutes a nuisance the test is whether there is a sufficient amount of light left for ordinary purposes of occupation or business according to the ordinary notions of mankind: *Colls* v. *Home and Colonial Stores, Ld.* (1) Applying that test to this case, and accepting for the moment the findings of the learned judge, the plaintiff has no cause of action.

[COZENS-HARDY L.J. Is a man who lives in the country entitled to more light than one who lives in London?]

We submit not.

[VAUGHAN WILLIAMS L.J. Is not the true result of the decision in the House of Lords in *Colls* v. *Home and Colonial Stores, Ld.* (1), that you must apply a standard varying with the situation and the circumstances of the house?]

Whichever standard is adopted the plaintiff's case fails, for Kekewich J. finds that the morning-room is still a well-lighted room and capable of being used for ordinary purposes of occupation. Generally speaking, it is a fair working rule to say that no substantial injury is done to the plaintiff where an angle of 45° is left to him, especially if there is a good light from other directions: per Lord Lindley in *Colls* v. *Home and Colonial Stores, Ld.* (2) Both those conditions exist in this case.

2. Assuming that there is a cause of action, a mandatory injunction is not the proper remedy. It is clear from the judgments in *Colls* v. *Home and Colonial Stores, Ld.* (1), that

(1) [1904] A. C. 179, 195, 197, 198, 204. (2) [1904] A. C. 210.

the House of Lords considered that in ordinary cases, i.e., where there has been no sharp practice, damages are primâ facie the proper remedy: see in particular the speeches of Lord Macnaghten (1) and Lord Lindley (2); and there is no suggestion of any sharp practice on the part of the defendant in this case.

[VAUGHAN WILLIAMS L.J. Were not damages in equity a substitute for an injunction? Cases of this kind were taken to the Court of Chancery because damages were not an adequate remedy. Subject, however, to what we may hear from the plaintiff's counsel, I am inclined to think that the present case is not one for a mandatory injunction.]

P. O. Lawrence, K.C., and *W. M. Cann*, for the plaintiff. The question is really one of fact, and the conclusion of Kekewich J. upon the evidence should not be disturbed.

[VAUGHAN WILLIAMS L.J. We shall not disturb the findings of fact of the learned judge.]

The question is whether the reasonable user of the plaintiff's morning-room has been substantially affected by the defendant's building. It is submitted that it has, and that the plaintiff is entitled to a mandatory injunction.

The first question is, Is there a nuisance in fact? There is a great distinction between nuisance in the case of business premises and nuisance in the case of a dwelling-house. In the former, the question is, whether the plaintiff is prevented from carrying on his business as beneficially as before the defendant's building was erected; in the latter, the question is, whether the plaintiff's house has to a sensible degree been rendered less fit for occupation than it was before—whether the light has been sensibly diminished so as to interfere with the ordinary occupation of the room: *Colls* v. *Home and Colonial Stores, Ld.* (3); *Back* v. *Stacey* (4); and see *Clarke* v. *Clark* (5), per Lord Cranworth. It is no answer to say that the plaintiff has as much light as other people. It is not a question how much light is left, but it is a question of

(1) [1904] A. C. 192, 193.
(2) Ibid. 212.
(3) Ibid. 179.
(4) (1826) 2 C. & P. 465; 31 R. R. 679.
(5) (1865) L. R. 1 Ch. 16, 20.

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comparison whether by reason of deprivation of light the house is substantially less comfortable than it was before: *Kelk* v. *Pearson*. (1) The question is one of nuisance, not of quantity of light. The Court is not called upon to fix a standard of light, but to say whether, taking all the circumstances into consideration, there has been a substantial interference with the plaintiff's light. This is the result of *Back* v. *Stacey* (2); *Parker* v. *Smith* (3); *Wells* v. *Ody* (4): all which cases were approved by the House of Lords in *Colls* v. *Home and Colonial Stores, Ld.* (5)

[VAUGHAN WILLIAMS L.J. referred to *William Aldred's Case* (6) and to Termes de la Ley, p. 460, "Nuisance."]

That the angle of 45° is not the test is shewn by *Pringle* v. *Wernham* (7) and *Theed* v. *Debenham*. (8) Where the plaintiff occupies the house as a dwelling-house, and the obstruction to the light makes the house sensibly less fit for occupation, damages based upon the diminution of the letting or selling value of the house are not an adequate remedy, although they might be sufficient if the action was brought by an owner who did not occupy.

Hughes, K.C., in reply.

VAUGHAN WILLIAMS L.J. The question what tests are to be applied in an action brought for obstruction of ancient lights, in order to ascertain whether the plaintiff has a good cause of action, has recently been very much discussed in the House of Lords in *Colls* v. *Home and Colonial Stores, Ld.* (5), and I think that the House of Lords intended to lay down rules which should be applied in future cases of this nature. I do not think that I am saying anything disrespectful of judges in days gone by, whether Common Law judges or Chancery judges, in saying that the cases which have been decided are not quite consistent as to the tests that should be applied, and,

(1) (1871) L. R. 6 Ch. 809, 814.
(2) 2 C. & P. 465; 31 R. R. 679.
(3) (1832) 5 C. & P. 438; 38 R. R. 828.
(4) (1836) 7 C. & P. 410; 46 R. R. 358.
(5) [1904] A. C. 179.
(6) (1610) 9 Rep. 57 b.
(7) (1836) 7 C. & P. 377.
(8) (1876) 2 Ch. D. 165.

under these circumstances, it was obviously very desirable that the differences, such as they were, in the principles laid down by those cases should be settled once and for all. This being the first occasion in which the Court of Appeal has had to apply the principle which has now been laid down by the House of Lords, I hope that we may be able to apply that principle—I say deliberately "that principle," because I think that in substance there was only one principle laid down in the various speeches of the Law Lords in *Colls* v. *Home and Colonial Stores, Ld.* (1)—so as to shew that the law has now been reduced to sufficient clearness to make it capable of practical application.

The main distinction which runs through the two lines of cases is this: The right of a houseowner to light gained by prescription, whether before or after the Prescription Act, was regarded by one school as being a mere right of property, and by the other school the right was regarded, not as a right of property in light, or, as it is sometimes inaccurately stated, in light and air, but as a negative easement, being a right to prevent some landowner from using his land so as to constitute a nuisance to the owner or occupier of a house upon adjoining land. Those were the two rival views of the law which appear in the cases antecedent to *Colls* v. *Home and Colonial Stores, Ld.* (1) But, as the result of the decision of the House of Lords in *Colls* v. *Home and Colonial Stores, Ld.* (1), we must now apply the view of that school who held that the only right that was gained by the prescription was a negative easement—a right to prevent your neighbour from so using his land as to injure you, who happened to be the adjoining owner or occupier. This view is shortly expressed by saying that the rights which are to be enforced in respect of this prescriptive easement are rights which would properly be enforced by an action of nuisance. An action of nuisance is different from an action of trespass. An action of trespass is the action which was brought where the body or the land of a person had been invaded. An action of nuisance is the action which was brought where there was no invasion of the property of somebody

(1) [1904] A. C. 179.

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else, but where the wrong of the defendant consisted in so using his own land as to injure his neighbour's. This action of nuisance was not in any way limited to cases where the plaintiff had acquired a legal right, and still less was it limited to cases in which the plaintiff had acquired a legal right in the nature of prescription. The action, in the popular as well as the precise legal sense of the word, would lie if a man so used his own land as to cause the air which passed over his neighbour's land, in which he had and could have no special right of property whatsoever, to be noxious and harmful. There was some doubt about that down to the case of *Angus* v. *Dalton*. (1) That was an action brought against a defendant who by digging on the edge of his own land had let down the surface of his neighbour's land. There was no right dependent on prescription, because the right of lateral subjacent support for land uncovered with buildings is a common law right, and one which exists independently of any property in anything vested in the plaintiff. The action in that case was not and could not be an action of trespass; it was in the nature of an action of nuisance. But, supposing the land to be burdened by buildings, buildings of such weight that the subsidence of the land would not have occurred but for the buildings, in that case the plaintiff would have a prescriptive right, and it would be his prescriptive right, and his prescriptive right only, which enabled him to bring the action. Nevertheless, his action was an action of nuisance. I mention this case of the subsidence of land in particular, because it seems to me to illustrate the proposition that the action is equally an action of nuisance whether the plaintiff is relying upon his common law rights, or whether he is relying upon a prescriptive right.

In all these cases of nuisance, one has to consider what must be proved by the plaintiff in order to support his action. It seems to me that the House of Lords went upon the principle that, whether the plaintiff was relying upon his common law rights, or upon his prescriptive rights, or his rights of property of any sort or kind, the conditions precedent to constitute a

(1) (1878) 4 Q. B. D. 162; (1881) 6 App. Cas. 740.

cause of action were really identical. The Courts have always been unwilling in these cases of nuisance to hold that every nuisance, apart from the rule de minimis non curat lex, should be a cause of action. On the contrary, in all these cases of nuisance which involve a limitation of a man's right to use his own land, the Courts will not enforce the alleged rights of the plaintiff, unless that which has occurred is a substantial interference with his comfortable or profitable occupation of his dwelling-house, or warehouse, or house of business, as the case may be. Whether or not this rule, which according to my view has been applied in *Colls* v. *Home and Colonial Stores, Ld.* (1), is logically justifiable, I do not take upon myself to say, and I do not think that it is very important, because it seems to me that there can be no doubt that such a rule, whether logical or not, is a rule which owes its existence to the convenience and comfort of the people at large. It is convenient that no man should be allowed to enforce rights to such an extent as to interfere with the good and the progress of the community. That I understand to be the meaning of the decision in the House of Lords, and I cannot bring myself to the conclusion that that rule is wrong because, for reasons of convenience or for any other reason, the judges have thought fit to refer the origin of easements to grant in such a way that easements may be rightly spoken of as conventional rights. They are conventional rights, and it may be that in strict logic conventional rights ought to be enforced according to their verbal definition; but I take it that that is not the law. I think we must bear in mind that in these cases, which are conveniently grouped together as cases in which the proper form of action is an action of nuisance, citizens are not to be allowed to enforce rights which limit the user by others of property, unless the facts relied upon as constituting a nuisance are such as interfere with the ordinary rights which according to the ordinary notions of mankind they are entitled to exercise in relation to one another and in relation to their property.

Having said that, I will try to apply what was said by the Law Lords in *Colls* v. *Home and Colonial Stores, Ld.* (1), to

(1) [1904] A. C. 179.

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the facts as found by Kekewich J. in this case. Lord Halsbury there says (1): "The test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action." Lord Macnaghten in his speech refers to the summings-up of the judges at Nisi Prius in *Back* v. *Stacey* (2), *Parker* v. *Smith* (3), and *Wells* v. *Ody* (4), and he adopts them as supplying a definite test. The definition by Tindal C.J. in *Parker* v. *Smith* (3), which he cites, is as follows (5): "That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises is such as really makes them to a sensible degree less fit for the purposes of business or occupation." He then quotes *Wells* v. *Ody* (4), tried before Parke B., and says (6): "In his charge to the jury the learned judge said that he entirely adopted the law as laid down by Tindal C.J. in *Parker* v. *Smith*. (3) And then, after reading a passage from *Parker* v. *Smith* (3), he concluded his address to the jury by saying: 'The question, therefore, which I shall leave to you is whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises and make them less fit for occupation.'" I need not read any more of Lord Macnaghten's speech, because, although he deals, and deals very clearly, with the various difficulties that may arise in cases, he never at any

(1) [1904] A. C. 185.
(2) 2 C. & P. 465; 31 R. R. 679.
(3) 5 C. & P. 438; 38 R. R. 828.
(4) 7 C. & P. 410; 46 R. R. 358.
(5) [1904] A. C. 187.
(6) Ibid. 188.

point in his speech departs from the definitions given in *Back* v. *Stacey* (1), *Parker* v. *Smith* (2), and *Wells* v. *Ody*. (3) Later on he cites the judgments in *Kelk* v. *Pearson* (4) and *City of London Brewery Co.* v. *Tennant* (5), but they seem to me only to follow out the principles laid down in those three Nisi Prius cases. The passage in the judgment of James L.J. in *Kelk* v. *Pearson* (6) to which Lord Macnaghten refers is as follows: "Now I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement"—James L.J., it is to be observed, states it properly as a negative easement—"a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air, to such an extent as to render the house substantially less comfortable and enjoyable." Lord Davey's speech, in respect to the definition of what is essential to constitute this cause of action, does not, I think, in any way differ from the speech of Lord Macnaghten. He sums up the law thus (7): "According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind." That is applicable to all cases, and contains the definition generally of what is essential to constitute the right to light.

Lord Lindley in his speech says (8): "*Kelk* v. *Pearson* (4) shews that in ordinary cases a person does not necessarily

(1) 2 C. & P. 465; 31 R. R. 679.
(2) 5 C. & P. 438; 38 R. R. 828.
(3) 7 C. & P. 410; 46 R. R. 358.
(4) L. R. 6 Ch. 809.
(5) (1873) L. R. 9 Ch. 212.
(6) L. R. 6 Ch. 811.
(7) [1904] A. C. 204.
(8) Ibid. 206.

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acquire a right to enjoy in future all the light he has had for twenty years. He may have had more than was reasonably required either for domestic or business purposes; and in that case his right to protection is limited to the amount of light reasonably required." That is to the same effect as a passage in the speech of Lord Halsbury (1): "The question may be very simply stated thus: After an enjoyment of light for twenty years, or if the question arose before the Act for such a period as would justify the presumption of a lost grant, would the owner of the tenement in respect of which such enjoyment had been possessed be entitled to *all* the light without any diminution whatsoever at the end of such a period?" He answers that by saying that he would not be entitled to all the light.

Lord Lindley quotes *Kelk* v. *Pearson* (2) and *City of London Brewery Co.* v. *Tennant* (3) approvingly, and says that the doctrine stated in *City of London Brewery Co.* v. *Tennant* (3), though stated in somewhat different language, is the same as that stated in *Kelk* v. *Pearson* (2): "That doctrine," Lord Lindley says (4), "as stated in *City of London Brewery Co.* v. *Tennant* (3), is that generally speaking an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop, or other place of business. The expressions, 'the ordinary notions of mankind,' 'comfortable use and enjoyment,' and 'beneficial use and occupation,' introduce elements of uncertainty; but similar uncertainty has always existed and exists still in all cases of nuisance, and in this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement." I think I have read sufficient to shew that, in principle, the result of all these cases is that the interference with the access of light through the ancient windows of the plaintiff must be of such a character as sensibly

(1) [1904] A. C. 182.
(2) L. R. 6 Ch. 809.
(3) L. R. 9 Ch. 212.
(4) [1904] A. C. 208.

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to interfere with the comfort and convenience or usefulness of the building according to its character as a residence or a place of business, or warehouse, or whatever else it may be, according to the ordinary notions of mankind—the citizens of this country. Unless it amounts to that, there is no cause of action; the mere proof that a given percentage of light has been taken away is not sufficient.

In applying that test to this particular case I am going to take into consideration the light coming from other sources than through the particular window in respect of which the obstruction is complained of in this action. I need not discuss that question at length, because the defendant can hardly complain if I, in his favour, have taken into consideration light coming from other sources, even if I ought not to have done so; but I do not feel any doubt about the matter, and it seems to me that in *Colls* v. *Home and Colonial Stores, Ld.* (1), the Law Lords came to the conclusion, not only that we might, but that we must take into consideration the light coming from other sources.

[His Lordship then read the conclusions of fact found by Kekewich J. as set out in the statement of facts, and observed, with reference to the observations of the learned judge as to the alteration in the character of the room, that he did not understand the learned judge to mean that the mere fact that a room had lost its charm would be sufficient to constitute a cause of action, but only that the same obstruction which had made the room less convenient and less comfortable to use had also naturally diminished the charm of the room; and the Lord Justice added that in his opinion the learned judge would have arrived at the same conclusion without any consideration as to the effect of the obstruction upon the charm of the house. His Lordship then continued:—]

Upon these facts I have to ask myself, applying the test laid down in *Colls* v. *Home and Colonial Stores, Ld.* (1), whether there has been an obstruction which has rendered the house substantially less comfortable and convenient. I do not say that I should have come to the conclusion in fact which

(1) [1904] A. C. 179.

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Kekewich J. has, but I think there is evidence on which he could have come to that conclusion; and I have to bear in mind that he saw the witnesses, and was able to judge of their demeanour; and I do not think that I ought to go behind the conclusions in fact of the learned judge. There are things in his conclusions which cause some little trouble to my mind. He says that this room is, notwithstanding the obstruction, still a well-lighted room. One cannot help asking oneself whether a house can be substantially less comfortable and convenient when the learned judge says that the room is still a well-lighted room; but I am not prepared to say that a room may not be still a well-lighted room after the obstruction, and yet be a room which is substantially less comfortable and less convenient according to the ordinary notions of mankind in this country. I think that may be so. I do not know what the exact standard is that one applies when one uses the word "well-lighted." "Well-lighted" is obviously a comparative expression: it may mean well lighted taking the average of rooms, or it may mean well lighted taking the average of the opinions of people of the present day as to the quantity of light that is required. I do not know in which sense it is used here, but if it means merely that the room is well lighted taking the average of rooms of houses in the suburbs, or the average of rooms in the metropolis or in large towns, it seems to me that, notwithstanding that the room is well lighted in that sense, it still might be that the obstruction has rendered the house substantially less comfortable and convenient according to the ordinary notions of mankind. Under those circumstances there is nothing in this finding in fact by the judge which prevents my adopting it. Again, he says: "If the test were whether there is sufficient light left to enable the room to be used for the purposes for which it was designed, there would be no further question." As I understand, he means to find that there is sufficient light left to enable this room to be used for the purpose for which it was designed. There again it seems to me that, notwithstanding that there may be sufficient light left, it is possible that the obstruction has changed a room which had ample light for all the purposes

likely to be carried out in it into a room in which there is a bare sufficiency of light for its occupation for the purpose designed. In that case again, I think, it may be true to find, as the learned judge has found, that according to the ordinary notions of mankind the house has been substantially made less comfortable and less convenient. In dealing with this question of fact I do not think that we can leave out of consideration the evidence of the experts as to value. These experts are men who very often can tell with great accuracy and certainty what effect the taking away of a particular convenience in a house may have upon its letting or selling value. It is not suggested here that these witnesses were prejudiced, or that there was any ground for distrusting them. They say that the house has diminished in value to the extent of, I think, 20*l.* to 25*l.* a year; and even if it were taken at a less sum, I cannot doubt but that the house must have been made substantially less comfortable and convenient according to the ordinary notions of mankind by reason of the obstruction.

In one sense I entirely agree with what was said by Kekewich J. about the leaving of sufficient light not being a test; but it seems to me that it is absolutely impossible to apply the test which has been defined by the House of Lords without taking into consideration, amongst other things, the amount of light which is left in a particular room at the time when the obstruction takes place. Under these circumstances I do not see my way to differ from the judgment of Kekewich J. that there is a cause of action here.

Then one has to consider whether there ought to be damages, or a mandatory injunction. With regard to that I propose to apply either the test laid down by Lord Macnaghten in *Colls* v. *Home and Colonial Stores, Ld.* (1), or that laid down by A. L. Smith L.J. in his judgment in *Shelfer* v. *City of London Electric Lighting Co.* (2) It seems to me here impossible to say that there ought to be any injunction upon the ground that the defendant has acted in a high-handed manner, or has shewn a desire to steal a march upon the plaintiff, or to evade the jurisdiction of the Court. I think—and I wish emphatically

(1) [1904] A. C. 193. (2) [1895] 1 Ch. 287, 321.

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to state this—that both parties here honestly acted in accordance with what they believed, and not unreasonably might believe, to be their legal rights. Nor do I think that there is any ground for the suggestion that the plaintiff has lost her right to an injunction by reason of delay.

The only other matter which, according to Lord Macnaghten's speech, remains to be considered is whether this injury cannot be fairly compensated by money damages. I think it can be, and therefore I think there ought to be no mandatory injunction. I will not refer in detail to the rules laid down for general application in the judgment of A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (1); but according to my view there is nothing in any one of those rules which makes it right that a mandatory injunction should be granted here.

There remains the question of damages. With regard to that, I do not think that Kekewich J. has definitely found any sum for damages, and notwithstanding the evidence of the experts—evidence to which attention ought to be given by reason of their knowledge, and also by reason of, I think I may say, their impartiality in this matter—I have great difficulty in agreeing with them myself in putting the damage quite as high as 25*l.* a year. I think, therefore, that there ought to be an inquiry in chambers as to damages, if the parties cannot agree upon the amount.

ROMER L.J. This case is a simple one in one respect. It is a case in which the house which is alleged to be injured is occupied by ordinary persons for the common purposes of domestic life. It is not a case of a business being carried on or of extraordinary user of any kind. The case is further narrowed by this—that practically the only part of the plaintiff's premises that we need consider is that which is called the morning-room. As I understand it, it is in respect of that room alone that the learned judge has thought the plaintiff entitled to relief. That being so, I have to consider what is the law applicable to this case.

(1) [1895] 1 Ch. 321.

That law has recently been expounded by the House of Lords in the case of *Colls* v. *Home and Colonial Stores, Ld.* (1) I have carefully considered, as was my duty, the addresses of the noble Lords who decided that case, and I think I am enabled to gather from those addresses on what principle I am to deal with the case now before us. I may state that principle shortly. The case has to be approached undoubtedly, now, from the point of view that the plaintiff must establish what might fairly be called a nuisance. That, of course, in itself is no sufficient guide; but I am enabled to gather from *Colls* v. *Home and Colonial Stores, Ld.* (1), how a jury should be directed, or how a judge should direct himself in trying to determine in each case what would constitute a nuisance.

I think that all the noble Lords were agreed, at any rate for the purposes of such a case as this, in accepting the law as laid down with some variation of language, but without any substantial difference, in the four cases of *Back* v. *Stacey* (2), *Parker* v. *Smith* (3), *Kelk* v. *Pearson* (4) and *City of London Brewery Co.* v. *Tennant.* (5) I take the law to be now, as stated in *City of London Brewery Co.* v. *Tennant* (5), as follows, strictly limiting the statement to such a case as we have now before us: "An owner of ancient lights is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house." That I take to be in the present case a sufficient and proper direction of law, coupled only with this further statement, which I think is essential. I think that, in considering what according to the ordinary notions of mankind is sufficient light for the comfortable use and enjoyment of the house, one ought to bear in mind the locality, and also the amount of light coming from other sources, assuming that it is light to which the plaintiff is entitled by grant or prescription. Upon this point Lord Lindley in *Colls* v. *Home and Colonial Stores, Ld.* (6), says, with the approval, as I gather, of the other Lords: "As regards

(1) [1904] A. C. 179.
(2) 2 C. & P. 465; 31 R. R. 679.
(3) 5 C. & P. 438; 38 R. R. 828.
(4) L. R. 6 Ch. 809.
(5) L. R. 9 Ch. 212, 216.
(6) [1904] A. C. 210.

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light from other quarters, such light cannot be disregarded; for, as pointed out by James V.-C. in the *Dyers' Company* v. *King* (1), the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable"; and he goes on: "I apprehend, however, that light to which a right has not been acquired by right or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account." It appears to me that those are sufficient directions to me as to the law on the subject, and all I have to do is to see how the facts of the present case are to be dealt with in accordance with that law.

I think it is impossible to say that the present case, on the facts, is free from difficulty. It appears to me to be one which may fairly be said to be on the border-line. That it is difficult I think may fairly be inferred from the fact that I, unfortunately for myself, have come to a different conclusion of fact in this case from that arrived at by my brothers. After considering the evidence in this case, and doing my best to arrive at a conclusion whether according to the law the defendant's building has caused a nuisance to the plaintiff, the conclusion I have come to is that the plaintiff has failed to establish a nuisance in respect of these lights.

I will shortly state my reasons for coming to that conclusion, and I will first deal with the question irrespective of the judgment of Kekewich J. I have no doubt whatever that the defendant's building by its erection caused less light than before to come to the west window of the morning-room in question, and that not to an immaterial extent, and I bear in mind in the conclusion I have come to what the locality is here, and how matters stood before the erection of the defendant's house. I will first deal with the evidence which arises from an inspection, as it were, of the premises themselves. We have not the advantage, of course, of being able to go and see the premises themselves, but we have very good models before us, and it is not suggested that those models do not accurately give a proper

(1) (1870) L. R. 9 Eq. 438.

representation of the two houses, and enable the Court to judge how the defendant's house interferes with the lights of the plaintiff's premises. To my mind the evidence which a jury could get from an inspection, or which a judge could get if he saw the premises himself, or from seeing a fair and proper representation of the premises, is very important. I say this not only because it is my own opinion, but because in *Back* v. *Stacey* (1) Best C.J. told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witness, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone; and that address to the jury has been approved by the House of Lords. (2)

When I look at these two premises and consider the defendant's house with relation to the plaintiff's, and particularly with relation to the morning-room, I notice that the morning-room is a comparatively small room, extremely well lighted by two windows, the north window and the west. The north window is wholly uninterfered with by the defendant's premises and it is an ancient light; and therefore, bearing in mind what was said by Lord Lindley, I am entitled to consider for present purposes that that light remains. Then, with regard to the west light, I notice that to the north even the west window of the plaintiff's morning-room has light coming from nearly the whole, if not the whole, of a quarter of a circle, that is to say, due north to nearly due west, wholly uninterfered with. Of course that would not be direct sunlight, but it is light coming from the north. There is only a partial interference with the west window itself between west and south-west. Moreover, the height of the defendant's house is not excessive in my opinion. It is not a case where it takes away 45° of light. So far as even the highest point may be said to affect the west window of the morning-room, it does not interfere to that extent. If, then, I had to answer the question before me by reason of a knowledge of those premises, seeing that the north light was wholly uninterfered with and the west light was only partially interfered with, I should myself have been disposed to come to

(1) 2 C. & P. 465; 31 R. R. 679. (2) [1904] A. C. 187.

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the conclusion on that evidence that the room would still remain well lighted, and would have sufficient light according to the ordinary notions of mankind for its comfortable use and enjoyment as a dwelling-house. At any rate, I could not come to the opposite conclusion, or say that I was satisfied from looking at the models that any nuisance had been committed.

Then, how does the evidence stand apart from the most important evidence that arises from regarding the premises themselves? I must say that, so far as the experts are concerned, speaking for myself, they give evidence, no doubt, in accordance with their opinions, but they are, of course, influenced, naturally, by the side on which they are called. It is not possible that that should not be so; otherwise, how could one explain the discrepancies in their evidence which we find here and in every case, the experts on the one side giving one view and those on the other side giving another? I do not think that the experts' evidence removes the impression on my mind caused by a knowledge of the two houses together.

Now I come to the evidence of the occupiers of the house. Their evidence is open, to my mind, to this observation. They are not considering, of course, a question of nuisance; they are comparing the morning-room as it is now with the room without any obstruction whatever to the west, and they would naturally think, if they experienced any interference with their light, that it interfered with their comfort. They would naturally not appreciate the point that there might be an interference with light which was not a nuisance at law. Taking into consideration their evidence, and also the evidence of the expert witnesses and the evidence derived from looking at the models, I am not satisfied on the evidence as a whole that there has been what amounts to a nuisance in this case.

If I had thought that the learned judge had come to an opposite conclusion of fact, I should have hesitated to give effect to my view; but, doing my best to understand the judgment of the learned judge, I do not come to the conclusion that his findings of fact shew that a nuisance has been committed. In fact, I think, on a fair interpretation of his judgment, that he has made certain findings which negative the idea of nuisance.

The very first finding he has with regard to this morning-room is this: "It was an exceptionally well-lighted room, and even now is well lighted." So that if the test "were whether there is sufficient light left to enable the room to be used for the purposes for which it was designed, there would be no further question." In other words, he holds as a fact that this is a well-lighted room still, and well lighted for the purposes for which the room was built, and the purpose for which that room was built we know was that of occupation as a morning-room for ordinary family domestic purposes. Therefore, this is, to my mind, a clear finding that, notwithstanding anything the defendant has done, the plaintiff still has—following the words used in *City of London Brewery Co.* v. *Tennant* (1)—"sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house," and of this morning-room in particular. That is, I think, the conclusion at which he has arrived on that finding, and I think that there is nothing in the rest of his judgment to negative that. He certainly finds that there has been a large obstruction of light. As regards that, I am as well able to judge as the learned judge himself, of course, to what extent there has been an obstruction. I do not think it can be said that there is a large obstruction. That there has been an obstruction I agree, and the amount of it I am aware of; but, even taking it that there has been a large obstruction of light to the west window, that does not decide the question. Then he says that there has been a large interference with the cheerfulness of the room, not with its comfortable use and enjoyment as part of the dwelling-house, but with its cheerfulness. He makes it clear later on what he means, because he says: "I am convinced that the character of the room is altered"—that means in respect of the cheerfulness—"and that, though still a well-lighted room, it has lost in the obstruction of light one of its chief charms and advantages." In other words, when the plaintiff had used the morning-room with a look-out to the west wholly unobstructed, it had a charm and advantage in its special cheerfulness, and by reason of the

(1) L. R. 9 Ch. 212, 216.

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deprivation of that the character of the room, to that extent, has suffered; but the judge does not find that which amounts to a nuisance. On the contrary, as I have pointed out, he finds as a fact that which in my own opinion shews that there was no nuisance.

That being so, it appears to me that the judgment of the learned judge, far from enabling me to depart from the opinion that I should otherwise have formed on this case, confirms it; and I come to the conclusion on the whole of this case that the plaintiff's case fails, and that the action ought to have been dismissed.

COZENS-HARDY L.J. This is a very important and extremely difficult case, and, as there is a difference of opinion, it is necessary that I should shortly state why I agree with the judgment given by my Lord.

It is needless to say that I approach this case with an anxious desire to follow loyally the decision of the House of Lords in *Colls* v. *Home and Colonial Stores, Ld.* (1), so far as I can gather the principles which ought to govern us. I am not sure that I entirely agree with my Lord when he says that there was in substance only one principle laid down by the Law Lords in that case. I think I can trace several points of difference, though they are not, perhaps, material for the purposes of the present case. It may be that in the very lengthy and interesting and elaborate discussion which we have had over that case we have somewhat forgotten that all the Law Lords based their judgments upon the findings of fact of Joyce J. There was there a clear finding that the proposed building would not affect the selling or letting value of the respondent's premises; and there was also a finding that the diminution of light would not materially affect the respondent's comfort or convenience. The decision in *Colls* v. *Home and Colonial Stores, Ld.* (1), therefore, does not seem to me to amount to more than this—that an obstruction which neither lessens the letting or selling value of the house, nor materially affects the comfort or convenience of the occupier,

(1) [1904] A. C. 179.

does not in law justify an action, even though a large proportion of light previously enjoyed has been lost.

In the present case I think it is clear that the learned judge has held that the letting or selling value of the house has been affected by the defendant's building, and he has also certainly found that the comfort and convenience of the occupier have been affected by it. That being so, there is nothing, I think, in the decision in *Colls* v. *Home and Colonial Stores, Ld.* (1), which in any way prevents me from arriving at the conclusion which I propose to adopt. It has been strenuously argued on behalf of the appellant that all we have to consider is the amount of light which has been left. I cannot accept that view of the law. It seems to me that the law as approved by the House of Lords, particularly by Lord Macnaghten, cannot be better stated than it was by Parke B. in *Wells* v. *Ody* (2): "The question, therefore, which I shall leave to you is, whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises, and make them less fit for occupation." Is it any answer to say that the room is still a well-lighted room? I think not, if the building makes the room less fit for occupation, and I do not think that we can bring in the phrase "according to the ordinary notions of mankind" to cut down the effect which would otherwise result from a building of this nature. I, for my part, accept the findings of fact of Kekewich J. He has found, as I read his judgment, that the letting and selling value has diminished, and that the plaintiff's morning-room is materially affected so far as the comfort and convenience of the occupiers are concerned. That being so, I agree with my Lord that there is a good cause of action. I pass from the judgment with this sole remark, that it seems to me that the learned judge applied the law quite correctly, or, to use a common phrase, he directed himself properly as to the law.

When I come to the relief which he gave, I am bound to say that I think this is not a case for a mandatory injunction. There is no case of sharp practice or unfair conduct on the

(1) [1904] A. C. 179. (2) 7 C. & P. 410, 412; 46 R. R. 358.

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part of the defendant. It is not a case of irremediable damage, or of the house being rendered uninhabitable, nor is it a case in which damages cannot be regarded as reasonable and adequate compensation. I think it is impossible to doubt that the tendency of the speeches in the House of Lords in *Colls* v. *Home and Colonial Stores, Ld.* (1), is to go a little further than was done in *Shelfer* v. *City of London Electric Lighting Co.* (2), and to indicate that as a general rule the Court ought to be less free in granting mandatory injunctions than it was in years gone by.

Then, assuming that there is no mandatory injunction, are we in a position to assess the amount of damages? I think not. Although Kekewich J. held that the plaintiff had suffered damages, he did not quantify them. That being so, it seems to me that we are driven, even at this late stage, to say that there must be a reference to the master in chambers in the usual way, or to an official referee, to ascertain the amount of damages. This, however, ought not to affect the costs of the appeal, or of the second trial, which must be paid by the appellant; but as to the costs of the first trial and the first appeal, the respondent must pay those.

Solicitor for plaintiff: *Graham Gordon.*

Solicitors for defendant: *Redfern & Hunt.*

(1) [1904] A. C. 179. (2) [1895] 1 Ch. 321.

H. B. H.

ORMEROD, GRIERSON & CO. *v.* ST. GEORGE'S IRONWORKS, LIMITED.

C. A. 1905 March 2.

[1902 O. 479.]

Practice—Discovery—Production and Inspection of Documents—Right to take Copies—Rules of Supreme Court, Order XXXI., *rr.* 14, 15; *Order* LXV., *r.* 27, *sub-r.* 18.

On the application of the plaintiffs, an order was made for the production at the office of the defendants' solicitor of documents in the possession or power of the defendants. The order further provided that "the applicants, their solicitors and agents, are to be at liberty to inspect and peruse the documents so produced, and to take copies and abstracts thereof and extracts therefrom, as the applicants shall be advised":—

Held, that under this order the plaintiffs were entitled, as they would have been under such an order made in the Court of Chancery before the Judicature Act, to make copies themselves or by their solicitors or agents of the documents produced in accordance with the order.

Sub-rule 18 of rule 27 of Order LXV. has not taken away the right of a litigant who obtains such an order to make copies himself of the documents produced.

The object of that sub-rule is only to fix the amount of the charge to be paid by the inspecting litigant when he formally requires a copy or extracts to be furnished to him by his opponent.

Decision of Joyce J. affirmed.

APPEAL by leave from an order made by Joyce J. in chambers.

On February 17, 1903, upon the application of the plaintiffs, an order was made that the defendants, the St. George's Company (by their proper officer), and the other defendants respectively, should make and file full and sufficient affidavits "stating whether they respectively have or have had in their possession or power any, and if any what, documents relating to the matters in question in this action, and accounting for the same." And it was ordered the defendants "do at all seasonable times upon reasonable notice produce" at the offices of their respective solicitors "the documents which by such affidavits shall appear to be in the possession or power of the respective deponents, except such of the same (if any) as they

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respectively may by such affidavits object to produce. And the applicants, their solicitors and agents, are to be at liberty to inspect and peruse the documents so produced and to take copies and abstracts thereof and extracts therefrom, as the applicants shall be advised."

On June 8, 1904, an order was made that the plaintiffs "be at liberty at all seasonable times upon reasonable notice to the solicitor for the defendants, the St. George's Company, to attend with Sir Eustace Piers, Bart., the father and duly appointed agent of the plaintiff Charles Piggott Piers, at the office of the said defendants' solicitor, to inspect the documents disclosed by the said defendants in this action, and to take copies and abstracts thereof and extracts therefrom, as the applicants shall be advised."

On February 8, 1905, on the application of the plaintiffs, the order now appealed from was made, by which it was ordered "that unless the defendants, the St. George's Company, forthwith undertake to allow the applicants, their solicitors and agents, to copy the said documents" (i.e., the documents ordered to be produced by the order of February 17, 1903) "as they please, the said defendants, by their secretary or other proper officer, do within ten days from the service hereof produce and leave at the Central Office, Royal Courts of Justice, the documents mentioned in such affidavit" (the affidavit made by the defendants' secretary in pursuance of the order of February 17, 1903), "except such documents as they thereby object to produce."

This order was made because the defendants' solicitor had refused to allow the plaintiffs' solicitors to take copies of the documents produced at his office, and said that if they required copies of any documents they must bespeak them from him and he would supply them at the usual rate.

On making the order Joyce J. delivered the following judgment:—"The order for affidavit and production, &c., is in the time-honoured form in use before the Judicature Act, and since continued. That form of order, in my opinion, authorized the person inspecting to 'take' or 'make' (for to my mind there is not for the present purpose any difference in the meaning of

those two words) copies or extracts: see *Pratt* v. *Pratt* (1) and the observations of Lindley L.J. in *Mutter* v. *Eastern and Midlands Ry. Co.* (2) The only question is, whether the Rules of the Supreme Court, Order LXV., r. 27, sub-r. 18, directly or indirectly alter the effect of such an order. I have not been able to ascertain how or when this rule originated. But, in my opinion, all it does is to provide what the charge is to be when the inspecting party formally (by writing) requires a copy or extracts to be made for him by the other party.

"I do not see how the supposed rule contended for by the respondents to this summons could practically be worked. How is the line to be drawn between what the inspecting party may copy and what he may not?

"The result is that the respondents must either undertake to allow the applicants to copy as they please, or the documents must be brought into Court, which is the strict course, production at the office of the solicitor being in truth an indulgence permitted for the convenience and with the assent of the parties or one of them: see *Brown* v. *Sewell*. (3)

"I give leave to appeal, it being a moot point and an important one. I do not require any further argument before me either in chambers or in Court."

The St. George's Company appealed.

Danckwerts, K.C., and *Charles Bathurst*, for the appellants. The reason for the objection of the defendants' solicitor to allowing copies of the documents to be made by the plaintiffs' agent was that his constant attendance with a clerk at the solicitor's office, which is a small one, caused great inconvenience to the solicitor and interfered with the carrying on of his own business. The plaintiffs can obtain all they require by means of copies furnished to them by the defendants' solicitor.

It is submitted that, having regard to the Rules of the Supreme Court, and especially to (4) sub-rule 18 of rule 27 of Order LXV.,

(1) (1882) 30 W. R. 837; [1882] W. N. 117, 151.
(2) (1888) 38 Ch. D. 92, 105.
(3) (1880) 16 Ch. D. 517, 518.
(4) Order XXXI., r. 14: "It shall be lawful for the Court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or

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the defendants' solicitor was justified in his refusal, and that the plaintiffs cannot insist on copies being made by their own agent.

[STIRLING L.J. The old practice of the Court of Chancery was that the documents should be deposited in Court. The production of the documents at the office of the solicitor of the producing litigant was an indulgence for the convenience of the litigant: *Brown* v. *Sewell.* (1)]

The practice is laid down in *Prestney* v. *Colchester Corporation.* (2) Whatever may have been the strict practice in the Court of Chancery, the usual course was that the documents should be produced at the office of the solicitor of the producing litigant, and that that solicitor should furnish copies of the documents to his opponent: *Bonnardet* v. *Taylor.* (3) In that case

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power, relating to any matter in question in such cause or matter, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

Rule 15: "Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or judge shall deem sufficient for not complying with such notice, in which case the Court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the Court or judge shall think fit."

Order LXV. is headed "Costs."

By rule 27, "The following special allowances and general regulations shall apply to all proceedings and all taxations in the Supreme Court of Judicature" (inter alia):—

"(18.) As to taking copies of documents in possession of another party, or extracts therefrom, under rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4*d.* per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof."

(1) 16 Ch. D. 517, 519.

(2) (1883) 24 Ch. D. 376.

(3) (1861) 1 J. & H. 383.

Page Wood V.-C. said (1): "The common order gives the plaintiffs power to go themselves and make copies and extracts, though the usual practice is to take the copies from the solicitors of the defendants": *Pratt* v. *Pratt* (2); Bray on Discovery, ed. 1885, p. 174. It is submitted that the effect of sub-rule 18 of rule 27 is to adopt that usual course as the practice of the Court. The expression "taking copies" in sub-rule 18 has a special meaning and is distinguished from "making copies." You "take" a copy when you obtain it from another person, and that is not the same thing as "making" a copy for yourself.

It has been held in some cases that the right to inspect documents carries with it an implied right to take copies, because otherwise the inspection would not be effectual: *Bevan* v. *Webb* (3); *Mutter* v. *Eastern and Midlands Ry. Co.* (4) But the right to inspect does not in all cases carry with it the right to take extracts or to make copies: *In re Balaghât Gold Mining Co.* (5) And it is submitted that here the implied right is excluded by the express terms of sub-rule 18.

[They referred also to *Prentice* v. *Phillips* (6); Daniell's Chancery Practice, 7th ed. vol. ii. pp. 1574, 1575; *Coleman* v. *West Hartlepool Harbour and Ry. Co.* (7); Kerr on Discovery, p. 24; Seton on Judgments, 6th ed. vol. i. p. 80; *Republic of Peru* v. *Weguelin.* (8)]

Felix Cassel, for the plaintiffs, was not called upon.

VAUGHAN WILLIAMS L.J. On February 17, 1903, an order for discovery in the common form was made in this action, and after the usual order for production of documents there came these words: "and the applicants, their solicitors and agents, are to be at liberty to inspect and peruse the documents so produced and to take copies and abstracts thereof and extracts therefrom, as the applicants shall be advised." Subsequently, on February 8, 1905, the order was made from which this appeal is brought. [His Lordship read the order.]

(1) 1 J. & H. 387.
(2) 30 W. R. 837.
(3) [1901] 2 Ch. 59, 74.
(4) 38 Ch. D. 92.
(5) [1901] 2 K. B. 665.
(6) (1843) 2 Hare, 152.
(7) (1861) 5 L. T. 266.
(8) (1872) L. R. 7 C. P. 352.

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I cannot put the matter better or in a shorter way than it was put by Joyce J. in his judgment. Speaking of rule 27, sub-rule 18, of Order LXV., the learned judge said: "In my opinion all it does is to provide what the charge is to be when the inspecting party formally (by writing) requires a copy or extracts to be made for him by the other party." I do not think the appellants' counsel contended that under the practice of the Court of Chancery before the Judicature Act an order in the form of the order made in the present case would not have entitled the person who obtained it to make copies himself of the documents produced if he chose to do so. But it is said that this effect of the old form of order has been taken away by the words of rule 27, sub-rule 18, of Order LXV. It is said, and I think rightly said, that the word "take" in that rule is used in the sense of obtaining a copy from the other party. And it is said that that rule was intended to take away the old right of the person who obtained the order for production to make copies himself of the documents produced for inspection. I cannot accede to that view. It seems to me manifest that the expression "take copies" is frequently used in legal documents to cover the case of a copy being made by the party who is inspecting as distinguished from the case of his obtaining a copy from the other party. The case of *Mutter* v. *Eastern and Midlands Ry. Co.* (1) is a striking instance of the use of the word "take" in that sense, for in the judgment of Chitty J. I find the following passage (2): "There is no prohibition on the shareholder, during the time that he makes his inspection, making notes of that which he inspects. As was said, he might, if he could, commit the whole register to memory. That of course would be a difficult thing to do. But there is nothing in the Act which prevents his making a note, and if he may make a note, I do not see why he may not make a complete note of any particular part: in other words, why he may not make an extract, and from that it seems to follow that he may make a reasonable use of the inspection and *take* a copy. . . . I think that when a man is inspecting, he may make bonâ fide use of his inspection, and it follows from

(1) 38 Ch. D. 92. (2) 38 Ch. D. 98.

his right to inspect that he can make copies." It is plain that Chitty J. is there speaking of what the party inspecting may do himself and that he contemplates his "making" a copy himself, though he describes it by the word "take." And Lindley L.J. (1) employs the word "take" in the same sense.

Then it was said that, although the right to inspect documents will, generally speaking, imply a right to make copies of the documents, because generally the whole object of inspection would be defeated if you could not make copies of the documents, yet that general right may be negatived, and for that purpose *In re Balaghât Gold Mining Co.* (2) was cited. It was said that because in that case, in which the right of inspecting the register of members of a company was given by s. 32 of the Companies Act, 1862, the Court held that the only right was that which was expressly given by the Act, and that there was no right to take extracts or to make copies of the entries in the register, we ought to say here that, as sub-rule 18 of rule 27 of Order LXV. enables the person inspecting to obtain copies of the documents in a particular way, the inference is negatived that he has a right to make copies himself. In that case reliance was placed on *Mutter* v. *Eastern and Midlands Ry. Co.* (3), in which the right to inspect and peruse the register of debenture-stock holders of a company was given by s. 28 of the Companies Clauses Act, 1863. It is true that in both those cases the right to inspect was a statutory right and that you must look at the statute to see whether a right to make copies was also given. But the distinction between the two cases was pointed out by A. L. Smith M.R. in *In re Balaghât Gold Mining Co.* (4) He said: "I quite agree with what fell from Lindley L.J. and other members of this Court in *Mutter* v. *Eastern and Midlands Ry. Co.* (3), but that case was not decided upon this statute" (i.e., the Companies Act, 1862), "but upon the Companies Clauses Acts. There is no case that binds us, but the matter came before North J. in *Boord* v. *African Consolidated Land and Trading Co.* (5), and

(1) 38 Ch. D. 101.
(2) [1901] 2 K. B. 665.
(3) 38 Ch. D. 92.
(4) [1901] 2 K. B. 667.
(5) [1898] 1 Ch. 596.

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that learned judge, mainly, as I think, on a consideration of cases not arising under this statute, came to the conclusion that the right to inspect carries with it the right to take copies. I cannot bring myself to agree with that view. It seems to me that the statute fenced the right of the person inspecting, with regard to copies, by saying that he may require a copy of any portion of the register. That is not language to describe taking a copy, and, further, there is another restriction that he is to pay 6*d.* per hundred words for such portions of the register as he requires to be copied. In my opinion, it is not the true construction of the statute, on which alone the right to copies of the register depends, to say that the person inspecting is entitled to take a copy and to take it without paying anything. In *Mutter* v. *Eastern and Midlands Ry. Co.* (1) Lindley L.J. finishes his judgment by stating the ground on which he came to the conclusion at which he arrived. He says (2): 'Upon the ground, therefore, that in this case the right to take a copy cannot be denied without rendering the right to inspect practically useless, I am of opinion that the order appealed from (which permitted the applicant to take copies) was correct.' That does not apply to this case, because the person who inspects can get such copies as he requires by paying for them." In my judgment neither of those cases assists us in the present case. When once you have arrived at the conclusion that the word "take" may cover the case of a person making copies for himself, the only question to be decided is whether there is anything in the Acts or the Rules which tends to shew that the only right now is to obtain copies of the documents from the other litigant on payment of the charge mentioned. I can find nothing in the Acts or the Rules which leads me to that conclusion. It is said that the making of copies by the person inspecting might cause great inconvenience in the office of the solicitor where the documents are produced. I do not think that is a sufficient reason for saying that the settled practice has been altered and that there is now no right to make copies. In my opinion Joyce J. was perfectly right in making the order which he made. The defendants were in default in refusing

(1) 38 Ch. D. 92. (2) 38 Ch. D. 107.

to allow copies of the documents to be made. If the contention of the defendants is right the practical result would be, as was pointed out by Page Wood V.-C. in *Bonnardet* v. *Taylor* (1), that, "if the plaintiffs are to be contented with taking copies from the defendant's solicitors, they must bespeak copies of the whole" of the documents, when they may really require only to make copies of parts.

STIRLING L.J. I am of the same opinion, and I agree with the reasoning of Joyce J. The real question is, what is the meaning of the order which was made by Joyce J. on February 17, 1903? That order is the common order for production of documents, and is in the form 18 in Appendix K to the Rules of the Supreme Court, and the form which was in use in the Court of Chancery prior to the Judicature Act. There is no dispute as to what was the meaning of such an order when it was made before the Judicature Act. The effect of it was thus explained by Page Wood V.-C. in *Bonnardet* v. *Taylor* (1): "The common order gives the plaintiffs power to go themselves and make copies and extracts, though the usual practice is to take the copies from the solicitors of the defendants." There can, I apprehend, be no question about the meaning of the order at that time, or that the word "take" in it included "make." The second order made by Joyce J., on June 8, 1904, was practically in the same form, and if it had been made before the Judicature Act there can be no question that the word "take" would have included "make." Is there then any reason to suppose that the meaning of the order has been altered by anything contained in the Rules under the Judicature Act? [His Lordship read rule 14 of Order XXXI.] By those two orders of February 17, 1903, and June 8, 1904, the Court did direct the production of documents by the defendants, and also to a certain extent directed how the documents when produced were to be dealt with. Rule 15 of Order XXXI. deals with a more limited class of documents. It deals with the production for inspection of documents which are referred to in the pleadings or in affidavits, and it provides that

(1) 1 J. & H. 387.

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every party shall be entitled to give notice to the other party to permit him "to take copies" of such documents. It is not disputed that the word "take" there includes "make." Then we come to sub-rule 18 of rule 27 of Order LXV. That order deals with "Costs," and rule 27 deals with "Special Allowances and General Regulations." [His Lordship read sub-rule 18.] It is said that the effect of that sub-rule is to deprive the litigant of the right which before the Judicature Act he would have had under an order made in this form—the right of making copies himself of the documents produced. In my judgment that right is a valuable one to a litigant. It might save expense to a poor man, and might be valuable in other ways. It might hamper litigants if they were deprived of that right. Is that the true effect of sub-rule 18? In my opinion it is not. I think that if it had been intended to deprive litigants of that right it would have been done by express words. It appears to me that sub-rule 18 was intended only to deal with costs—to regulate the terms on which a litigant is to be supplied with copies of documents by his opponent. That is the view which was taken by Joyce J., and I agree with him. It is said that this practice is inconvenient, and that it is not often resorted to. I agree that the practice is not often resorted to; but it is always in the power of the Court to frame the order in such a way as to diminish the inconvenience as much as possible.

Solicitors: *Robert Kent; Lewis & Lewis.*

W. L. C.

C. A.
1905
March 13.

In re MORDAN.
LEGG *v.* MORDAN.

[1904 M. 396.]

Will—Construction—Investment by Trustees—Breach of Trust—Power to invest on Freehold or Leasehold Ground-rents—Purchase of Leasehold Ground-rents.

A testator bequeathed the residue of his estate to his trustees, upon trust to invest the same on Government securities, "or upon freehold ground-rents, or upon leasehold ground-rents not having less than sixty years unexpired, and held direct from the freeholder."

The trustees were to receive "the dividends, rents, and annual income thereof," and to divide and pay the same unto and equally between the testator's two daughters, for and during their lives. On the death of either of them the corpus of her share was to go to her issue:—

Held, that the above clause authorized the trustees to invest the residue in the purchase of freehold ground-rents or of leasehold ground-rents of the character specified.

Decision of Kekewich J. reversed.

APPEAL from a decision of Kekewich J.

The plaintiff was a residuary legatee under the will of Francis Mordan, who died on March 27, 1868. The defendants were Percy Charles Mordan and Clara Mordan, who were the executors of Augustus Mordan, who was one of the executors and trustees of the testator's will. The other executor and trustee was George Lockyer, who retired from the trust in May, 1885, when the other defendant, Walter Henry Mills, was appointed by a deed dated May 16, 1885, a trustee in his place.

By his will dated December 7, 1867, the testator Francis Mordan, after making various specific and other bequests, bequeathed all the residue and remainder of his estate and effects to his executors and trustees, "upon trust to invest the same at their sole discretion on Government securities of Great Britain or upon freehold ground-rents or upon leasehold ground-rents not having less than sixty years unexpired and held direct from the freeholder and as to such leaseholds

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with or without going into the lessor's title as at the sole discretion of my said trustees they may see fit and be advised." The trustees were "to receive the dividends rents and annual income thereof and to divide and pay the same unto and equally between" the testator's two daughters Ursula and Ellen Mordan for and during the term of their natural lives. On the death of either of the daughters leaving issue the corpus of her share was to go to her issue. The daughter Ellen Mordan married, and died on March 19, 1901, leaving the plaintiff her only child her surviving.

Before the appointment of the defendant Mills as a trustee of the will the trustees had invested a considerable part of the testator's residuary estate in the purchase of leasehold ground-rents of the character mentioned in the will.

By her statement of claim the plaintiff claimed (inter alia) a declaration that these purchases were not authorized by the testator's will, and a declaration that the defendants, the executors of Augustus Mordan, ought to make good out of his estate all losses occasioned by any breaches of trust committed by him in the administration of the estate of the testator Francis Mordan, or the execution of the trusts of his will, including in particular losses occasioned by the purchase of the leasehold ground-rents.

On the trial of the action Kekewich J. made a declaration that, upon the true construction of the will, the trustees were "not authorized to invest the residuary estate of the testator or any part thereof in the purchase of freehold ground-rents or of leasehold ground-rents," and granted consequential relief.

The executors of Augustus Mordan appealed.

Eve, K.C., and *Daniel Jones*, for the appellants. It is submitted that the words of this will on their natural construction authorize the trustees to purchase either freehold ground-rents or leasehold ground-rents of the kind specified.

T. L. Wilkinson, for the surviving trustee.

Stewart-Smith, K.C., and *T. Ribton*, for the plaintiff. It is submitted that on the proper construction of the words they only authorize an investment on the security of ground-rents,

freehold or leasehold. Leasehold ground-rents would be a wasting property, and there might be little or nothing left for the remaindermen. Moreover, on a purchase of leasehold ground-rents the trustees would become liable upon the covenants in the lease, and would be entitled to an indemnity out of the testator's estate. It is not probable that the testator could have intended an investment which might involve such consequences.

VAUGHAN WILLIAMS L.J. The question is whether under the terms of this will the purchase of leasehold ground-rents which has been made by the trustees was authorized. In my judgment it was authorized. It was argued that we ought to give a very limited meaning to those words, but I do not think that we ought to put on them the limited construction which has been suggested. It has been scarcely argued that the words of the will are not wide enough to confer authority to make the investment which has been made. The whole argument comes to this—looking at the consequences which might result from such an investment, it is improbable that, if the testator had considered all those consequences, he could have intended to authorize such an investment to be made. I do not think that any of those considerations are sufficient to justify us in restricting the natural meaning of the words. Indeed, I go further. In my opinion, even if the words are capable of the limited construction which has been suggested, yet, having regard to the other words which deal with the distribution of "the dividends, rents, and annual income" by the trustees, the natural inference is that the testator intended that the words which give the authority to invest should have that wider effect which I think they ought to have. If the words had been intended to have the more limited operation, one would have expected the words in the trust for division to have been "dividends, *interest*, and annual income." In my judgment we ought not to read the words in question as if they had been "to invest . . . . *upon the security of* freehold ground-rents or leasehold ground-rents." The appeal must be allowed.

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STIRLING L.J. The short question is whether this testator has authorized the purchase of freehold or leasehold ground-rents by his trustees. The trust is to invest "on Government securities or upon freehold ground-rents, or upon leasehold ground-rents" of the character specified. Are the words "on Government securities" limited to investment on the security of Consols or other Government securities? Clearly not. It is admitted that the trustees are at liberty to purchase Consols. But it is said that the words "on freehold ground-rents or on leasehold ground-rents" mean "on the security of freehold ground-rents or leasehold ground-rents." But the words "the security of" are not found in the clause. It appears to me that, if the authority to invest on Government securities would justify a purchase of Consols or other Government security, the authority to invest on freehold or leasehold ground-rents must equally justify a purchase of freehold or leasehold ground-rents. In my opinion, the words are too wide to admit of the restricted construction which has been suggested.

SIR GORELL BARNES, PRESIDENT. I agree.

Solicitors: *Boyce & Son; A. F. Church & Son; Woodbridge & Sons.*

W. L. C.

HANFSTAENGL *v.* W. H. SMITH & SONS.

KEKEWICH J.

[1904 H. 2624.]

1905

Feb. 9, 10, 21.

Copyright—Picture—Infringement—"Copy"—Reproduction of Substantial Part—Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *s.* 11.

The plaintiff was the owner of the copyrights in several works of art, including an oil-painting of which the principal feature was the winged figure of Psyche, and his business consisted in reproducing these copyright works in various forms and sizes by means of photographic processes and selling the reproductions. The plaintiff complained that a very rough photographic illustration which appeared in the advertisement portion of a well-known magazine was an infringement of his copyright in this picture. The illustration, which was diminutive and was devoid of artistic merit, contained a rude reproduction of the female figure, but omitted a portion of the background of the picture. The defendants, who were vendors of the magazine, on becoming aware of the alleged infringement, took steps to have the illustration torn out before selling any further copies:—

Held, that the illustration was an infringement of the plaintiff's copyright, inasmuch as it tended to prevent the sale of the plaintiff's goods by familiarizing the public with a base form of reproduction; and judgment was given for the plaintiff for a farthing damages and costs.

THE plaintiff, who was a fine art publisher carrying on business in Munich, London, and New York, was the owner of the copyrights in a large number of works of art, and his business consisted in the reproduction of these copyright works in various forms and sizes by means of photographic processes.

The defendants were the well-known publishers and booksellers.

This action was brought in respect of an alleged infringement by the defendants of the plaintiff's copyright in an oil-painting by a German artist, Paul Thumann. The picture was known in this country as "Nature's Mirror." The principal feature of the picture was a draped female figure leaning on a rock and gazing into a pool of water, which reflected the surrounding objects. This figure was equipped with butterfly wings, and was intended for a representation of the goddess Psyche. In the background of the picture was a woodland scene. The picture, which was of a considerable size, contained a good

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deal of artistic work, and the plaintiff's reproductions had acquired a large amount of popularity.

The alleged infringement was contained in the advertising portion of *Munsey's Magazine* for August, 1904. *Munsey's Magazine* was an American serial which had a large circulation in this country. It was published both in New York and in London, and it was sold on the defendants' bookstalls. On one of the advertisement pages of the August number there appeared the following passage: "Free Prize Offer.—Around this announcement there are pieces or parts of some famous advertisements. Can you from these clippings identify the advertisers? Can you name the articles advertised? . . . . If you can name 40 per cent. of the advertisers or 40 per cent. of the articles here represented, I will give you absolutely free a six months' subscription for the *American Illustrator*, an illustrated monthly magazine." This announcement was surrounded by a number of photographic reproductions of pictures used in well-known advertisements. One of these reproductions consisted of a rude copy of the figure in Thumann's picture, but without the wings. This reproduction also included the rock on which the figure was leaning and the pool, but without the reflections, but it did not include the whole of the background of the original picture. The reproduction was of the roughest description, and was devoid of artistic merit. It was about the size of a halfpenny.

It appeared that the plaintiff had granted a licence to an American firm of mineral water manufacturers, called the White Rock Mineral Spring Company, to reproduce the picture for the purpose of advertising their mineral waters, and the infringement complained of in this action was intended to refer to this advertisement.

On August 4, 1904, an agent of the plaintiff purchased a copy of the magazine in question at one of the defendants' bookstalls, and on the following day the plaintiff's solicitors wrote to the defendants informing them of the alleged infringement and demanding reparation. Immediately on the receipt of this letter the defendants, who had no previous knowledge of the alleged infringement, instructed their agents not to sell any

further copies of the August number without first tearing out the offending page; but they declined to comply with all the plaintiff's demands; and accordingly the plaintiff commenced this action against them for an injunction and damages. The defendants denied the infringement.

The plaintiff's ownership of the copyright and his title to sue under the provisions of the Bern Convention were admitted; but a question was raised whether a photogravure produced by the plaintiff as being a copy of the original picture was in fact a true copy, and whether the plaintiff was not bound to produce the actual picture, which was in Germany. Ultimately, however, the defendants admitted for the purposes of this action that the photogravure sufficiently represented the original. The expert evidence adduced by the plaintiff was to the effect that the alleged infringement was calculated to damage the sale of the plaintiff's reproductions by vulgarizing the picture.

Stewart-Smith, K.C., and *Ashton Cross*, for the plaintiff. The reproduction complained of is a copy of the picture "or of the design thereof" within s. 11 of the Fine Arts Copyright Act, 1862. It is true that the reproduction is a small one; but if the plaintiff submits to this infringement he may find himself debarred from restraining more serious infringements.

P. O. Lawrence, K.C., and *R. J. Parker*, for the defendants. The object of the Act is to protect the reputation of the artist from being lessened in the eyes of the world, and also to secure him the commercial value of his property, and to be a copy within the Act it is essential that the alleged infringement should reproduce some at least of the artistic qualities of the original: *Dicks* v. *Brooks* (1), *Hanfstaengl* v. *Empire Palace* (2), and *Hanfstaengl* v. *Baines & Co.* (3) (the same case on appeal to the House of Lords).

This reproduction is not a copy within the test laid down in those cases.

If there is an infringement it is trivial, and it will be sufficient to award the plaintiff a farthing damages, and no costs.

(1) (1880) 15 Ch. D. 22, 36. (2) [1894] 3 Ch. 109, 133–4.
(3) [1895] A. C. 20, 26.

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Stewart-Smith, K.C., in reply. This at any rate is a copy of the design of the picture, and it is calculated to injure the plaintiff by vulgarizing the picture. If the reproduction conveys to the mind of the person seeing it the idea of the picture it is a copy, although it may be through a different medium and of a different size, and although it may be a coarse and clumsy copy: *Gambart* v. *Ball* (1); *Hanfstaengl* v. *Empire Palace*. (2) It is impossible to look at this reproduction without immediately calling to mind the original.

This case is like *Hanfstaengl Art Publishing Co.* v. *Holloway* (3), where the infringement consisted in a copy of the plaintiff's picture affixed to a pill-box.

Cur. adv. vult.

Feb. 21. KEKEWICH J. The question for decision is whether a rude figure published in *Munsey's Magazine* for August, 1904, is a copy of the picture known as "Nature's Mirror," or of the design thereof, within the meaning of the statute 25 & 26 Vict. c. 68. That statute in s. 1 provides that the owner of the copyright in a picture shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying the same, and the design thereof, and in s. 11 enables him to recover damages against any person who without his consent repeats, copies, colourably imitates, or otherwise multiplies, or causes or procures to be repeated, copied, or colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution any such picture or the design thereof. For the moment I am not concerned to consider the meaning in this Act of the word "design," about which something shall be said presently; but it must be determined whether this figure in *Munsey's Magazine* can properly be regarded as a copy of the picture "Nature's Mirror." What is the meaning of the word "copy" when used in this statute and other statutes of a similar character? The picture in the present case is admitted to be an oil-painting, and, although we have not seen the original, we know from the plaintiff's reproductions that it is a picture

(1) (1863) 14 C. B. (N.S.) 306, 317.
(2) [1894] 3 Ch. 109, 134.
(3) [1893] 2 Q. B. 1.

of considerable size embodying a large amount of artistic work. It portrays a draped female with wings kneeling on a rock and gazing on the water below, from whose calm depth objects on the bank are picturesquely reflected. There is a background carefully treated so as to bring into prominent relief the figure, rock, and water. Pictures, and particularly some of the best-known pictures in home and foreign galleries, are often copied, and no student would claim to have copied one unless he had placed on his canvas all the contents of the original in the colours there employed, and had endeavoured to the best of his skill and ability to reproduce the artistic merits. The result of his labours is what is generally styled a copy of the picture. It is, I think, obvious that for the purpose of the Act under consideration the word "copy" cannot be limited to a reproduction of this character, but it is not equally easy to say to what reproductions it ought to be extended. The authorities are by no means without instruction on this point, but much is left open for consideration and determination. It would be impossible fully to state the law as expressed in these authorities, most of which were cited in argument, without going through them at greater length than is convenient to do here and comparing the language of different judges. Each case deals with peculiar circumstances, and the endeavour of the Court in each was rather to apply the statutory provisions to the case in hand than to lay down principles or rules by which another Court might be guided in another case disclosing circumstances entirely different. In the following comment I have endeavoured, after careful study, to eliminate from these authorities what seemed specially applicable to the case before me and to find therein a sufficient guide for its determination. In *West* v. *Francis* (1) Bayley J. uses language coming, as Lord Watson says, nearer to a definition than anything which is to be found in the books. It runs thus: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." This oft-quoted language was criticized in *Hanfstaengl* v. *Baines & Co.* (2) by Lord Watson. He notices that

(1) (1822) 5 B. & Ald. 737, 743; 24 R. R. 541. (2) [1895] A. C. 20, 27.

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the learned judge was construing for the purpose of the case before him the provision in 17 Geo. 3, c. 57, a statute for the protection of copyright in engraving, which differs in expression from the enactments of 25 & 26 Vict. c. 68, and contains no reference to reproducing the design of the protected work, and then proceeds as follows: "As I read the later statute with which we have to deal in this case, the idea created by a picture or drawing does not necessarily form an element in the original work, or its design, which is protected by copyright. The same idea which is suggested by the copyright work may be expressed by another painting or drawing which is in no sense a copy, and does not borrow its design." This is a formidable criticism of Bayley J.'s definition, inasmuch as he strikes out of that definition the word "idea," which forms an important part of it; but I do not think that it was intended absolutely to destroy that definition. If it were altered thus—"a copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it"—the substance of the definition would be preserved and Lord Watson's criticism would be avoided. I am far from saying that this is more than a rough attempt at a definition, or that it is wholly satisfactory; but if one must formulate in words the meaning of "copy," that is, I think, sufficiently accurate. Passing over Bacon V.-C.'s remarks in *Dicks* v. *Brooks* (1) I find James L.J. saying (2): "It appears to me that without going into any etymological definition of the word 'copy,' and using the word in the ordinary sense of mankind as applied to the subject-matter, the question is, Is this a copy, is it a piracy, is it a piratical imitation of the engraving—of that which was the engraver's meritorious work in the print?" He was there dealing with a pattern for Berlin wool work, the description of which is to be found on p. 23, and he held, with the concurrence of Baggallay and Bramwell L.JJ., that this was not a copy of the engraving there in question. It may be that the Court would have also held that the wool-work pattern was not a copy of the original picture from which the engraving was made; but the substance of

(1) 15 Ch. D. 22, 29. (2) 15 Ch. D. 35.

the decision was that nobody would ever take it to be the print, and that it was not calculated to injure the print or the reputation of the owner or the commercial value of the engraving in the hands of the proprietor. This last consideration has certainly played a large part in many decisions, and without quoting the language used respecting it we may, I think, safely conclude that no alleged copy whether of a picture or of an engraving can properly be held to be a copy within the meaning of the statute and prohibited thereby unless commercial injury can be proved or reasonably presumed. In *Hanfstaengl* v. *Empire Palace* (1) Lindley L.J. says: "The possibility of injury to the plaintiff must be regarded, as was pointed out in *Dicks* v. *Brooks*" (2), and he cannot be taken to have intended to contradict this in the following passage on the next page, which is particularly apposite to the present case. After mentioning the case of *Hanfstaengl Art Publishing Co.* v. *Holloway* (3), where copies of the plaintiff's pictures were only used by being put on pill-boxes, but nevertheless were held to be infringements of his rights, he adds: "Again, unauthorized sketches of pictures made on purpose to convey, and, in fact, conveying, tolerably correct ideas of them would, I apprehend, be infringements of the copyrights in them, although the sketches might not compete with the pictures or with any copies of them which their authors or their assigns might desire to make or sanction." In the same case Davey L.J. thus expresses himself (4): "The point is not that these things are bad copies, but that they are not intended, and do not purport, to reproduce the value and essential qualities of the pictures as works of art, and are therefore not copies or reproductions at all within the meaning of the Act." The case in which these observations were made was taken to the House of Lords, and is reported there as *Hanfstaengl* v. *Baines & Co.* (5) It is worth while to read in this connection what was said by Lord Shand (6): "All that can I think be said is that the question of infringement of the right depends

(1) [1894] 3 Ch. 109, 129.
(2) 15 Ch. D. 22.
(3) [1893] 2 Q. B. 1.
(4) [1894] 3 Ch. 134.
(5) [1895] A. C. 20.
(6) Ibid. 31.

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on the degree of resemblance. It must be solved by taking each of the works to be compared as a whole and determining whether there is not merely a similarity or resemblance in some leading feature or in certain of the details, but whether, keeping in view the idea and general effect created by the original, there is such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original or the design—having adopted its essential features and substance." These extracts from the judgments of Lindley and Davey L.JJ. and Lord Shand seem to me to embody the judicial view of the problem to be solved, and in general terms the guide to its solution. Before leaving the authorities it is well to say something about the meaning of the word "design" as used in the statute. The Legislature certainly contemplated that there might be an infringement of copyright without a copy being made, and this possible event was intended to be covered to some extent by the employment of the word "design." To what extent? There are some pertinent remarks of Lord Herschell's in *Hanfstaengl* v. *Baines & Co.* (1); but let it suffice to quote a passage from Lord Watson's judgment (2): "I do not doubt that the addition of the words relating to design was intended by the Legislature to reach invasions of copyright which might possibly escape the imputation of being copies or colourable imitations of the work itself, and yet appropriated and incorporated the substance of what is described as the design of the work." Precisely the same thing, as I understand his language, is intended by Davey L.J. in his judgment in the same case in the Court of Appeal (3): "But it is said that the Act protects not only the picture, but the design. These words are probably inserted in order to bring within the protection of the Act a copy through a different medium, for instance, a black and white copy of a picture made by the engraver, the photographer, or the draftsman; but it must still be the design of the picture, and not a mere outline or descriptive sketch of it." I do not propose further to pursue this branch

(1) [1895] A. C. 23, 24. (2) [1895] A. C. 26.
(3) [1894] 3 Ch. 134.

of the case, because, applying the rule of interpretation of the statute afforded by the passages quoted, there is not, in my opinion, any good reason for holding the figure in *Munsey's Magazine* to be a reproduction of the design of the original picture, if it is not a reproduction in the sense of being a copy of it. Therefore, I do not pause to notice so much of the argument on the part of the defendants as was devoted to detailed criticism of the figure as a work of art, a phrase which in the ordinary acceptation could scarcely be applied to it. In considering, by the light thus thrown on it, the question whether the alleged infringement of the plaintiff's copyright must be held to be one in fact, the first thing to be grasped is the character of the alleged infringement. At least, I think that must in the particular case come before the appeal to the eye, without which no final decision is safe or possible. There is no occasion to pursue the process through the several stages; but what we see in the magazine is undoubtedly there by means of photography, and, however rough the reproduction may be—and rough it certainly is—there is intended to be, and there actually is, a reproduction of some parts of a photograph which is itself, perhaps, by many steps a reproduction of the original picture. For the sake of convenience in dealing with a small surface, some portions have been blotted out, and they comprise features which contributed largely to the character of the original. The background is gone, and the wings, which were a poetical addition to the picture and are preserved in all the photographs, are missing. But there is the lady with the same drapery and in the same position, kneeling on the same rock and intently gazing on what must be water, though it is no longer distinct and has no reflective surface. It is a base reproduction of the original, but still it is a reproduction embracing the more distinctive features, and obviously intended to represent them. The result of an appeal to the eye is equally conclusive. By this time I am tolerably familiar, not with the original picture, but with the photogravure which has taken its place for the purposes of this trial, and may be regarded as a fair equivalent. I cannot turn from the latter to the magazine without being reminded of

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Thumann's picture and instinctively recognising the work from which the base copy is taken. To this conclusion must be applied the test referred to above and mentioned in the authorities on the subject. Can the publication of this figure in this manner injure the commercial value of the original? Taking for this purpose the original to be as it really is the oil painting, the question must be answered in the negative. It would be preposterous to suppose that the reputation of the painter or the value of his work was in any way affected by this publication, even on the assumption, which probably is correct, that *Munsey's Magazine* has a large and extensive circulation. But is it possible to say the same of the plaintiff as the owner of the copyright and of his reproduction of the picture? Perhaps the question requires no answer as regards the larger reproduction, but as regards those of a smaller size, and particularly those, the smallest of all, which have been exhibited in Court, I cannot on the evidence, or by the application of my own imperfect knowledge of such matters, come to the conclusion that there is no injury. It is, I think, impossible to measure in money the injury already done, or, rather, I think that it would be impossible to say that any injury capable of such measurement has been done; but I am struck by the view supported by the plaintiff's witnesses that such a publication as appears in *Munsey's Magazine* vulgarizes that of which it is a reproduction—that is, tends directly to prevent the sale of the plaintiff's goods by reason of the familiarity of the public with a base form. The one issue of the magazine in which this alleged infringement of copyright appeared was promptly suppressed, and there is no occasion to grant an injunction in respect of it; but I adopt the plaintiff's argument that, if he desires to protect his copyright, he is bound to take action even in a case which is, on the face of it, of a trumpery character, or run the risk of encouraging more serious infringements. For the reasons above given I think the plaintiff is entitled to a verdict for nominal damages; and, seeing that he has come here to assert a right, the assertion of which was, as already stated, required for his protection, I see no reason why he should be deprived of his costs notwith-

standing that the defendants acted innocently, and on having their attention called to the matter did their best, so far as I know with complete success, to obviate any further cause of complaint.

There will be judgment for the plaintiff with a farthing damages and costs of action.

Solicitors: *Watkin-Williams, Gray & Steel; Bircham & Co.*

H. B. H.

TAYLOR *v.* ALLHUSEN.

[1904 T. 1145.]

Settlement—Construction—Power to appoint in favour of a Particular Class—Donee of Power herself a Member of the Class—Right of Donee to appoint to herself.

Under a settlement the trust funds in a certain event were to be held in trust for such persons and purposes and in such manner as the settlor should by deed or will appoint, so only that every such appointment should be made to or in favour of one or more of a specified class of persons, and in default of appointment in trust for the members of the class equally. The settlor was herself a member of the class:—

Held, that it was competent to the settlor under the power to appoint the trust funds to herself.

TRIAL OF ACTION.

In May, 1890, the plaintiff, Isabel Taylor, then Isabel Allhusen, was entitled to stocks and securities of the value of 3500*l.* standing in the name of her uncle, the defendant Wilton Allhusen, as trustee for her.

By a voluntary settlement dated May 31, 1890, and made between the plaintiff of the one part and the defendant W. Allhusen of the other part, it was declared that the income of the trust funds should be paid to the plaintiff for her life, and after her death, in case she should by deed or will so appoint, to any husband who might survive her for his life; and subject thereto the trust funds and the income thereof were to be held in trust for the children of the plaintiff as she should by deed or will appoint, and in default of appointment for all

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the children of the plaintiff who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry; and if there should be no child of the plaintiff who should attain that age or marry, then the trust funds and the income thereof should be held "in trust for such persons and purposes and in such manner as the said Isabel Allhusen shall by deed or will appoint, so only that every such appointment be made to or in favour of a grandchild or grandchildren of the late Christian Allhusen, the paternal grandfather of the said Isabel Allhusen, who shall have attained or shall attain the age of twenty-one years, or being female shall have previously married, and in default of and subject to any such appointment, upon trust for all such grandchildren of the said Christian Allhusen equally share and share alike."

The plaintiff was subsequently to the settlement married to her cousin Charles Percy Hale, who was one of the grandchildren of Christian Allhusen. He died in 1896. There was no issue of the marriage.

In the year 1903 the plaintiff married her present husband, Francis Pitt Stewart Taylor, and there was one child of the marriage, namely, the infant defendant, Reginald Pitt Stewart Taylor, who was born in July, 1904.

By her statement of claim the plaintiff alleged that she executed the settlement in ignorance of the unusual nature of the limitations contained therein, and without understanding the purport thereof, and she claimed—(1.) cancellation of the settlement, or (2.) rectification in manner therein stated, or (3.) alternatively (by way of amendment) that the construction of the settlement might be declared and the trusts thereof executed, and that a new trustee or new trustees might be appointed.

At the trial the claims for cancellation and rectification were not proceeded with, and the only question argued was whether, upon the true construction of the settlement, assuming it to be valid, it was competent to the plaintiff to appoint the trust funds to herself under the power.

The defendant W. Allhusen was willing to continue to act

as trustee of the settlement jointly with a named gentleman who was willing to act with him.

P. O. Lawrence, K.C., and *Percy F. Wheeler*, for the plaintiff. As the plaintiff is one of the grandchildren of Christian Allhusen, and therefore one of the objects of the power, it is competent to her to appoint the funds to herself. It is to be observed that the power down to the word "appoint" is simply in the form of an ordinary general power of appointment, under which it is of course competent to the donee to appoint to himself, and then follows a limitation of the power of appointment to a specified class of beneficiaries, of which class the donee is a member. There is nothing whatever in the terms of the instrument to exclude her from that class, or to shew that it was not intended that she should appoint to herself. She would unquestionably take a share under the gift over in default of appointment, and no good reason can be assigned why she should be excluded from taking under the appointment. There is no decided case directly in point, but in Farwell on Powers, 2nd ed. p. 492, it is stated that an appointment may be made to himself by the donee of a power if an exclusive appointment is authorized, and reference is made to *In re Sinclaire's Estate.* (1)

Stewart-Smith, K.C., and *Dighton Pollock*, for the defendant, the trustee of the settlement. The case last cited had reference to the construction of a particular will, and is not in point here.

[They referred to Sugden on Powers, ch. xi. s. 6, pl. 45.]

Wace, for the infant defendant.

KEKEWICH J. This point seems to me to be one of some importance apart from its novelty, and, having considered it since the Court rose yesterday, I have come to the conclusion that the plaintiff's contention ought to be upheld. The question is whether, assuming the settlement to stand, this lady, the plaintiff, can appoint to herself, and that depends entirely upon the construction of the particular instrument.

(1) (1867) I. R. 2 Eq. 45.

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There seems to be no authority directly bearing upon the point, and the books which have been cited, although useful, do not give one a conclusive guide. Farwell J., at p. 492 of his book, says: "If the intention is clearly expressed, there is no reason why the donee should not appoint the whole to himself, if the power authorized an exclusive appointment." That is a clear summing-up of the law, and no doubt a correct summing-up, although it comes in a comment on the case of *In re Sinclaire's Estate* (1), which turned entirely upon the construction of the particular instrument there before the Court, and is not, I think, valuable for the present purpose. The only other authority which was cited was Lord St. Leonards' book on Powers, ch. xi. s. 6, pl. 45. There again Lord St. Leonards does not touch this particular point, and he does not lay down any general rule, but what he does say is certainly not inimical to the conclusion contended for by the plaintiff here. This settlement was not made on marriage, but was a settlement on the lady for life, and then on any husband who might survive her for life, and then to the children in the ordinary way, with a power of appointment, and a gift over in default of appointment among the children. No question arises about that now. The only question arises under the clause by which in default of children taking a vested interest the property is limited as the lady should appoint by deed or will, the class being narrowed by the limitation that they are to be the grandchildren of the late Christian Allhusen. It so happens that the lady was herself one of such grandchildren, and that her first husband was also one. In default of the exercise of that power of appointment there is a trust for all "such grandchildren of the said Christian Allhusen equally, share and share alike." It could not be argued that if the lady does not exercise the power of appointment she will not herself be able to take a share under that gift in default of appointment. It occurred to me to refer to the case of *Lees* v. *Massey*. (2) The point upon which the case was reported is from what time and at what date the next of kin were to be ascertained; but there was a very able argument on the question

(1) I. R. 2 Eq. 45. (2) (1861) 3 D. F. & J. 113.

whether the lady herself in that case could take as one of the next of kin. There was a gift by will of all the testator's real estate to a daughter in fee simple, subject to intervening limitations, and the will contained a proviso that if the daughter should die without lawful issue, the testator's wife surviving, then he bequeathed his said estates to his wife for life, and after her decease to his relations, share and share alike. The word "relations" is, of course, equivalent to next of kin. Now, it turned out that when the estate came to be disposed of under that ultimate gift, it went to the daughter, and the daughter only, as the testator's next of kin, and the argument was that it was really inconsistent with the whole gift that she should take under the gift to the testator's "relations"; that it could not be that the daughter was to take that which was only to go to the next of kin in the event of her not being able to take—that is to say, the preceding limitations failing. However, that view found no favour with the Master of the Rolls or the Court of Appeal, and the decision, although it turned upon an entirely different point, resulted in giving the daughter, who was said to be excluded, the whole of the estate. Therefore I may fairly say that there is nothing inconsistent with or contrary to the ordinary rules of construction in holding in the present case that this lady would herself take a share in default of appointment, and that view is valuable for the purposes of the construction of the settlement. The trust is "for such persons and purposes and in such manner as the said Isabel Allhusen shall by deed or will appoint, so only that any such appointment be made to or in favour of a grandchild or grandchildren of the late Christian Allhusen," and then there is a gift over in default of and subject to any such appointment upon trust for those very grandchildren, of whom she was one; and if, remembering what I have just said, there is a gift in default of appointment to her as regards part of the property, that seems to me to be an extremely strong argument in support of the view that she was not to be excluded from the objects of the general power of appointment which preceded. As she was to take in default of appointment, it is difficult to say that she ought to be

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excluded from taking under the appointment. But that is not the only way of looking at the case. I was very much struck by the argument of the plaintiff's counsel that, if the clause in the settlement had stopped at the word "appoint" —that is to say, if it had read simply "in trust for such persons and purposes and in such manner as the plaintiff shall by deed or will appoint"—she might certainly have appointed to herself, and not only so, but it is the common form of a general power of appointment. Why should you cut that down? You would cut it down, of course, if the language so provided; but to cut it down so as to exclude herself from the general power of appointment when there are no clear words to do it, and when that general power would certainly have enabled her to make an appointment in her own favour, seems to me to be a straining of language which would be entirely wrong. Therefore, I hold that, upon the true construction of the instrument, the lady is entitled to appoint by deed or will to any of the grandchildren of Christian Allhusen, including herself. There will be a declaration to that effect, and the defendant W. Allhusen being willing to continue trustee of the settlement, another trustee will be appointed to act with him, and there will be consequential directions as to the transfer of the trust funds to the two trustees.

Solicitors: *Badham & Comins; Johnsons, Long & Co.*

C. C. M. D.

FARWELL J.

1904

Feb. 24; *March* 10.

In re ASHFORTH. SIBLEY *v.* ASHFORTH.

[1904 A. 1940.]

Will—Construction—Realty—Gift after last Survivor of Tenants for Life to a Class, necessarily ascertainable within due Limits, as Tenants for Life—Estate Tail to last Survivor of Class—Legal Contingent Remainder—Remoteness—Rule against Perpetuities.

The rule against perpetuities applies to legal contingent remainders as well as to equitable limitations.

A testatrix devised her real estate to trustees and their heirs upon trust to receive the rents and profits and divide the same as soon as they conveniently could after Lady Day and Michaelmas Day in each year into three equal parts, and pay the same as therein mentioned to A., B., and C., and the survivors and survivor of them during their lives and the life of the survivor; and, after the decease of such survivor, upon trust to pay and divide the said rents and profits, as soon as conveniently could be after the said days thereinbefore appointed, equally amongst all such of the children, born in her lifetime or within twenty-one years of her death, of the said A., B., and C. as should be living on the Lady Day or Michaelmas Day preceding such payment and division; and after the death of all such children, except one, the testatrix devised the said real estate to such surviving child in tail, with remainder over. C. survived A. and B. and died leaving no issue. B. also left no issue; but A. left children who were born within due limits and who survived C.:—

Held, that the estate tail limited to the survivor of the children of A., whether regarded as an equitable limitation or as a legal contingent remainder, infringed the rule against perpetuities and was void for remoteness.

ADJOURNED SUMMONS.

Martha Sarah Ashforth, widow, by her will dated February 21, 1863, devised a freehold farm and all other her real estate to trustees and their heirs upon trust to receive the rents and profits thereof, and, after giving her said trustees, their executors, administrators, and assigns, powers of leasing, and to fell and dispose of timber, and to employ agents and managers to manage the said real estate and to pay the expenses of management and all other outgoings, the testatrix directed as follows:—

"I direct the said trustees as soon as they conveniently can

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after Lady Day and Michaelmas Day in each year to divide the net rents and profits of the said farm into three equal parts, and out of the first of such third parts I direct my said trustees to pay the sum of 20*l.* by equal half-yearly payments to Miss Eliza Robinson for her life and, subject to such payment thereout, to pay the residue of the said third part to my son John Morris Ashforth for his life, and after his decease to pay the same third part, subject as aforesaid, to my son George Morris Ashforth and my daughter Martha Morris Ashforth during their joint lives in equal shares, and after the death of either of them then the whole to the survivor during his or her life. And I direct the said trustees to pay one other third part of the said net rents and profits to my son George Morris Ashforth for his life, and after his decease to pay the same to my said son John Morris Ashforth and my said daughter Martha Morris Ashforth during their joint lives in equal shares, and after the death of either of them then the whole to the survivor during his or her life. And I direct the said trustees to pay the remaining third part of the said net rents and profits to my daughter Martha Morris Ashforth during her life, and I hereby declare and direct that in case my said daughter Martha Morris Ashforth shall marry the shares and interests in the said net rents and profits both original and accruing bequeathed to her shall be during coverture paid into her own hands for her sole and separate use without power of anticipation, and after the decease of the said Martha Morris Ashforth to pay the said last-mentioned third part to my said sons John Morris Ashforth and George Morris Ashforth during their joint lives in equal shares, and after the death of either of them then the whole to the survivor during his life. And from and immediately after the decease of the longest liver of my said three children, John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth, I direct my said trustees for the time being, subject nevertheless to the payment of the said annuity to Eliza Robinson, if she should be then living, to pay and divide the said rents and profits of the said farm half-yearly, as soon as conveniently can be after the days hereinbefore appointed unto and equally amongst all such of the

children born in my lifetime or within twenty-one years after my death of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth who shall be living on the Lady Day or Michaelmas Day preceding such payment and division. And after the death of all such children of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth, except one, I devise my said farm and all my said real estate to such surviving child and the heirs of his or her body in tail, with remainder to the right heirs of John Morris, son of my grandfather Thomas Morris."

The testatrix died in July, 1864, and the farm mentioned in her will was the only real estate she had.

George Morris Ashforth died in August, 1870, leaving a widow and three daughters.

Martha Morris Ashforth died in November, 1877, without having been married.

John Morris Ashforth, who was the heir-at-law of the testatrix, died in November, 1897, without leaving any issue; and the defendants P. Ashforth and A. and E. Eldridge were the trustees of his will.

The plaintiffs were the three daughters of George Morris Ashforth, and the questions for determination were—(1.) whether the trusts of the said will of the testatrix declared concerning her real estate, to take effect after the death of the longest liver of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth, were valid and effectual, or whether the same or any and which of them were void for remoteness; and (2.) whether the plaintiffs could call for a conveyance of the legal estate from the present trustees of the said will of the testatrix.

J. G. Wood (*Upjohn, K.C.*, with him), for the plaintiffs. In the first place, we say that the whole fee simple is in the trustees, and that all the limitations are equitable; and when you have, necessarily ascertainable within due limits, all persons entitled to the enjoyment of the entire equitable estate, they can release their interests, call for a conveyance to themselves of the legal estate, and dispose of the property. The observations

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of Lord Cranworth in *Gooch* v. *Gooch* (1) support this view. There is no rule of remoteness which avoids the ultimate limitation as a perpetuity where the parties entitled can between them put an end to the limitations, and it is not necessary to shew which of them is going to get an estate tail as the last survivor.

[FARWELL J. referred to *In re Hargreaves.* (2)]

That case is clearly distinguishable. There were no persons there in the position of the present plaintiffs. Lewis on Perpetuity, who is cited with approval in *London and South Western Ry. Co.* v. *Gomm* (3), defines a perpetuity as a future limitation which is not destructible by the persons for the time being entitled to the property, subject to the future limitation, except with the concurrence of the individual interested under that limitation. Applying that test, the present case is not within the definition, because here the ultimate limitation can be destroyed by the three plaintiffs. They have the entire equitable fee between them, and can prevent the ultimate limitation to the survivor of them by requiring the trustees to convey the legal estate to them.

[FARWELL J. *Garland* v. *Brown* (4) is against you.]

The limitations there were different to those in this case. Secondly, the estate tail here limited is not an equitable interest but a legal contingent remainder, which is good. There are in the will no words of use to carry the whole fee to the trustees. The powers of leasing, &c., given to the trustees is given to them, their executors and administrators, which point to an estate pur autre vie, and then, after the limitation to the class of children as tenants for life, come the words, "I devise my said farm" to such surviving child in tail. That limitation is a legal contingent remainder: *Cooke* v. *Blake* (5); *Adams* v. *Adams* (6); and it is a remainder already vested in the plaintiffs and always ready to take effect on the happening of the event, and it is supported by the legal estate in the trustees or in

(1) (1853) 3 D. M. & G. 366, 383.
(2) (1890) 43 Ch. D. 401.
(3) (1882) 20 Ch. D. 562, 581.
(4) (1864) 10 L. T. 292.
(5) (1847) 1 Ex. 220.
(6) (1845) 6 Q. B. 860; 66 R. R. 582.

the tenants for life. The rule against perpetuities strikes at attempts to make estates inalienable; but here is a remainder well within due limits and vested in persons who can dispose of the estate.

[FARWELL J. In *In re Frost* (1) Kay J. states that the rule against perpetuities applies to legal contingent remainders.]

Yes; but in *Cole* v. *Sewell* (2) Lord St. Leonards expresses the contrary view, on which I rely. There is no direct authority that the rule of a life in being and twenty-one years applies to a legal contingent remainder, which has its own rules as to its particular estate.

Jenkins, K.C., and *G. Henderson*, for the trustees of the will of the heir-at-law. The first point is really concluded by the decisions in *In re Hargreaves* (3), *Garland* v. *Brown* (4), and *Symes* v. *Symes*. (5) The gift must vest within a life in being and twenty-one years. Here, although the person to take may be born within due limits, the Court cannot predicate who that person will be when the event happens, and the event may not happen within the necessary period. The gift of the rents to the last survivor of the class of children is also bad for the same reason. As to the second point, it is not disputed that the limitation of the estate tail is a legal contingent remainder. But that makes no difference. The rule is the same. *In re Frost* (1) is a direct decision in our favour, and, although it has been commented upon, it has not been dissented from.

D. W. Carr, for the trustees of the will of the testatrix.

Cur. adv. vult.

March 10. FARWELL J. delivered the following written judgment:—Martha Sarah Ashforth made her will on February 21, 1863, and thereby devised her real estate to trustees and their heirs upon trust to receive the rents and profits and divide the same as soon as they conveniently could after Lady Day and

(1) (1889) 43 Ch. D. 246, 253.
(2) (1843) 4 D. & War. 1, 28; S.C. (1848) 2 H. L. C. 186; 65 R. R. 668.
(3) 43 Ch. D. 401.
(4) 10 L. T. 292.
(5) [1896] 1 Ch. 272.

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Michaelmas Day in each year into three equal parts, and pay the same as therein mentioned to her three children and the survivors or survivor of them during their lives and the life of the survivor, and she then proceeded as follows: "And from and immediately after the decease of the longest liver of my said three children, John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth, I direct my said trustees for the time being, subject nevertheless to the payment of the said annuity to Miss Eliza Robinson, if she should be then living, to pay and divide the said rents and profits of the said farm half-yearly, as soon as conveniently can be after the days hereinbefore appointed, unto and equally amongst all such of the children born in my lifetime, or within twenty-one years after my death of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth who shall be living on the Lady Day or Michaelmas Day preceding such payment and division. And after the death of all such children of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth, except one, I devise my said farm and all my said real estate to such surviving child and the heirs of his or her body in tail, with remainder to the right heir of John Morris, son of my grandfather Thomas Morris." The testatrix died on July 7, 1864. Of her three children, George died in 1870, having had issue three children only, the present plaintiffs; Martha died without issue in 1877; and John died without issue in 1897. The question for decision is whether the limitation in tail is or is not too remote.

Property may be given to an unborn person for life or to several unborn persons successively for life, with remainders over, provided that such remainders be indefeasibly vested in persons ascertained or necessarily ascertainable within the limits prescribed by the rule against perpetuities: *In re Hargreaves* (1); *Evans* v. *Walker*. (2) Mr. Wood did not dispute this, but argued that, inasmuch as one of the three plaintiffs must necessarily be the survivor, they could combine to release or destroy the right of survivorship and take the property at once. But this assumes the existence of a present estate after the life estates,

(1) 43 Ch. D. 401. (2) (1876) 3 Ch. D. 211.

which will remain when the obnoxious contingency is destroyed, and there is none such; the only estates of inheritance are contingent interests in remainder. The Court has first to construe the will, and is driven to conclude that these interests are void for perpetuity. There is, therefore, no estate of inheritance in existence available for dealings by way of conveyance or otherwise, and nothing is left but the three life estates. The fallacy lies in the lack of appropriate definition. No release or destruction of the contingent interest would be of any avail. What is required is a dealing by way of conveyance of all the three contingent interests, and this is impossible, because they have been declared void, and three void contingent remainders will not make one good vested remainder. Mr. Wood relied on a passage in Lewis on Perpetuity, p. 164: "A perpetuity is a future limitation, whether executory or by way of remainder .... which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." It is to my mind plain that the learned author, in speaking of destructibility, is referring to remainders after an estate tail; but in any case the passage does not help Mr. Wood, because the validity of the estate which he wishes to create must depend on the conveyance of the ultimate remainders; the persons entitled subject to that limitation are entitled for life only. Mr. Wood also pressed on me a dictum of Lord Cranworth's in *Gooch* v. *Gooch*. (1) I think that if the whole of that passage is read it is plain that the Lord Chancellor was really thinking of a joint tenancy, and not of a gift to three with a contingent limitation to the survivor of them. But, however that may be, it is only a dictum; and the reasons given are not easy to reconcile with the judgments of the Court of Appeal in *In re Hargreaves* (2) and *London and South Western Ry. Co.* v. *Gomm*. (3) The case before me is really undistinguishable from

(1) 3 D. M. & G. 366, 383. (2) 43 Ch. D. 401.
(3) 20 Ch. D. 562.

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Garland v. *Brown* (1), before Wood V.-C., where there was a gift to the surviving children of the testator's surviving child for life in equal shares as tenants in common with remainder to the survivor of those children in fee, and the remainder in fee was held void for remoteness.

Then it is said that this is a legal contingent remainder supported by a particular estate vested in trustees during the lives of the grandchildren and of the survivor of them, and this was not disputed. But the plaintiffs argue further that such a remainder is not affected by any doctrine of remoteness, except the rule that estates cannot be limited to unborn persons for life with remainders to the issue of such unborn persons. I might have contented myself with following Kay J.'s decision in *In re Frost* (2); but it is said that this was only the second or alternative reason for his judgment, and I have accordingly considered the point for myself.

It is very difficult to say when the conception of perpetuity in its modern meaning first appeared in our Courts. There is no doubt that the common law regarded all attempts to restrict the free alienation of property with extreme disfavour. As is stated in Mr. Butler's note to Coke on Littleton, 342 b, i., although the suspense or abeyance of the inheritance (as distinguished from the freehold) was allowed by the common law, it was discountenanced and discouraged as much as possible, and modern law has added her discouragement of every contrivance which tends to render property inalienable beyond the limits settled for its suspense, because it is clear that no restraint on alienation would be more effectual than a suspense of the inheritance. He adds: "The same principles have, in some degree, given rise to the well-known rule of law, that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder; and they influence, in some degree, the doctrines respecting the destruction of contingent remainders." There was also the rule that an estate by purchase cannot be limited to the unborn child of an unborn child: *Whitby* v. *Mitchell*. (3) With all respect to Kay J., I do not

(1) 10 L. T. 292.
(2) 43 Ch. D. 246, 253.
(3) (1890) 44 Ch. D. 85.

think that much reliance can be placed on the existence of an independent rule of law forbidding a possibility on a possibility: see Gray on Perpetuities, p. 86, and Williams on Real Property, 6th ed. p. 245. The phrase seems due to Lord Coke's unfortunate predilection for scholastic logic, and may possibly be a pedantic and inaccurate reason for avoiding remoteness: see *Blamford* v. *Blamford* (1), cited in Gray at p. 86. "Coke moves another matter in this case on Popham's opinion, Coke I., Rector de Chedington, that a possibility on a possibility is not good, for here in our case is a possibility on a possibility . . . . yet it seems that it is good, for if Popham's opinion should be law, it would shake the common assurances of the land . . . . But I agree that in divers cases there shall not be a possibility upon a possibility, and he puts the diversities in *Lampet's Case*." (2) It seems probable that contingent remainders could not anciently have been created at all: see Williams on Seisin, p. 190; and that down to the time of the Commonwealth the usual mode of settlement on marriage was by giving vested estates tail to living persons, and not estates tail to unborn children: ibid. 189. Although, therefore, there was a general principle that alienation should not be restricted by the creation of estates beyond a particular estate for life with a remainder in fee, or in tail, I can find no trace of any statement of the present rule in terms in any of the old books. But the general principle was well established, and as the ingenuity of real property lawyers invented new devices for rendering land inalienable for as long a time as possible, it became necessary to mould the expression of the old law so as to meet new emergencies. Thus in *Cadell* v. *Palmer* (3) the House of Lords settled the question of the extent to which executory limitations and shifting uses, which had become possible under the Statute of Uses, could be lawfully carried, and they did this, not by creating any new law, for that would have been legislation, not decision, but by applying the old law to the new circumstances. The judges who advised the House supported their opinion by numerous authorities,

(1) (1615) 3 Bulst. 98, 108; S.C. 1 Roll. Rep. 318, 321.
(2) (1612) 10 Rep. 46 b, 50 b.
(3) (1833) 1 Cl. & F. 372; 36 R. R. 128.

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and I would refer in particular to the quotation from Lord Kenyon's judgment in *Long* v. *Blackall* (1): "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the Courts have said that the estate shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance." Here, then, is an authoritative statement in terms of precision of the rule of law which had existed for centuries, but had not been theretofore defined, and had been applied from time to time, as occasion arose, by judges who, without formulating the precise limits of the rule, held, as Lord Nottingham said in the *Duke of Norfolk's Case* (2): "If it tends to a perpetuity, there needs no more to be said, for the law has so long laboured against perpetuities, that it is an undeniable reason against any settlement, if it can be proved to tend to a perpetuity." The rule, however, was only to be applied to cases where it was really necessary in order to defeat remoteness, and, accordingly, Lord St. Leonards in *Cole* v. *Sewell* (3) points out that it has no application to remainders limited to arise after an estate tail, because they are destructible by barring such estate tail, and are no more open to objection than the estate tail itself; and this is the meaning of the reference to destructibility in the passage that I read above from Lewis on Perpetuity, p. 164. But this reason has no application to contingent remainders not so limited and destructible; nor do I think that Lord St. Leonards so intended: see Sugden's Law of Property, pp. 116–121, and Lord Brougham's speech in the same case in the House of Lords, 2 H. L. C. at p. 234, where he puts this ground plainly as the reason for his observations. It would be very strange indeed that Lord St. Leonards should have referred to the "sacred rule" enunciated in *Purefoy* v. *Rogers* (4) that no limitation shall be construed as an executory or shifting use which can by possibility take effect by way of

(1) (1796–97) 7 T. R. 100, 102; 4 R. R. 73.
(2) (1681) 3 Ch. Cas. 14, 31.
(3) 4 D. & War. 1; S.C. 2 H. L. C. 186; 65 R. R. 663.
(4) (1669) 2 Wm. Saund. 768, 781, n. 9.

remainder—a rule which probably owes its origin to the chance of destruction by the failure of the particular estate incident to the one and not to the other—and should at the same time have affirmed that the rule against perpetuities had no application to such contingent remainders, although they might exceed the limits allowed for executory limitations, because they could not exceed the limits of perpetuity, for the proposition is self-contradictory. Assume that the doctrine of the destructibility of contingent remainders by failure of the particular estate is due to the desire of the Courts to avoid remoteness, as Mr. Butler suggests, it does not follow that such remainders should be free from all other bonds. Liability to destruction for a particular cause at or before a given period is not incompatible with, or any ground for immunity from, destruction at the same period for a cause common to all other interests, executory, equitable, or otherwise, which may lead to remoteness. It is plain, moreover, that the Courts have acted upon the principle that the rule against perpetuities is to be applied where no other sufficient protection against remoteness is attainable. Thus, inasmuch as equitable contingent remainders never failed for want of a particular estate, it was held that the rule must apply to them. In *Abbiss* v. *Burney* (1) the gift was to trustees on trust for A. for life, and, after his death, on trust to convey to such son of his as should first attain twenty-five. Sir George Jessel M.R. said (2): "Where the legal fee is outstanding in the trustees, that doctrine of contingent remainders which, until the recent statute, prevented contingent remainders from taking effect at all unless they vested at the moment of the termination of the prior estate in freehold, has no operation, and on that ground I think that this appeal should be allowed." In *In re Trustees of Hollis' Hospital* (3) the late Mr. Justice Byrne held that the rule against perpetuity applied to a common law condition. He says (4): "The Courts have first to find what is the common law—that is, the principle embodied in what is called the common law—and then to apply it to new and ever-varying states of fact and circumstances . . . . New statutes

(1) (1881) 17 Ch. D. 211.
(2) Ibid. 230.
(3) [1899] 2 Ch. 540.
(4) Ibid. 552.

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and the course of social development give rise to new aspects and conditions which have to be regarded in applying the old principles. The policy of the law against the creation of perpetuities was certainly asserted at a very early date, as was also the policy of discountenancing unrestricted restraints upon alienation." In *Chudleigh's Case* (1) (the Case of perpetuities) the Court defeated an attempt to make the Statute of Uses serve as the means of protecting contingent remainders from destruction, lest lands should remain too long in settlement. In *Abbiss* v. *Burney* (2) the Court of Appeal defeated an attempt made by vesting all the legal estate in the property in trustees. The present attempt is made by vesting a legal estate pur autre vie in trustees and limiting the contingent remainders as a legal use. In my opinion, the Court is equally bound to defeat this; nor can I find any rule of law or decision or principle to the contrary. The opinion of the late Mr. Challis (Real Property, 2nd ed. pp. 174–177) is, I think, sufficiently displaced by Byrne J.'s judgment in the *Hollis' Hospital Case* (3), and that of the late Mr. Joshua Williams by Gray on Perpetuities, pp. 283–298; and the conclusion at which I have arrived is supported by (in addition to the text-writers cited in that case and in *In re Frost* (4)) an argument in the first edition of Jarman on Wills, vol. ii. p. 727, and repeated in some of the later editions, by Mr. Serjeant Stephen's note in his Commentaries, 8th ed. vol. i. p. 554, and by Mr. Gray's excellent Treatise on Perpetuities. The rule against perpetuities applies to all contingent equitable limitations of real estate and all contingent limitations of personalty, including leaseholds. It would certainly be undesirable to add another to the anomalies that adorn our law, as I should succeed in doing if I held that the rule did not apply to legal contingent remainders. I therefore answer the first question, by saying that the limitation in question is void for remoteness, and the second question in the negative.

Solicitors: *Bird & Eldridges; Buxton Carr.*

(1) (1589–95) 1 Rep. 120 a.
(2) 17 Ch. D. 211.
(3) [1899] 2 Ch. 540.
(4) 43 Ch. D. 246.

H. L. F.

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In re BANKS. BANKS *v.* BUSBRIDGE.

[1904 B. 2468.]

Will—Charge of Debts and Funeral and Testamentary Expenses on Realty—Gift of all Personalty to another Donee—Non-exoneration of Personalty.

The personal estate being the primary fund for payment of a testator's debts and funeral and testamentary expenses, and exonerated therefrom only where the intention to exonerate is shewn by express words or necessary implication from the whole will, it is insufficient, in order to establish exoneration, to find that the real estate is merely charged with the payment.

A testator gave all his personalty to K., and devised certain real estate to his trustees "subject to the payment of" his "just debts and funeral and testamentary expenses" to K. and other persons. The testator also in his will expressed the wish that none of his real estate should be sold whilst there was any male descendant of his own surname:—

Held, that the personalty was not exonerated from the payment of the debts and funeral and testamentary expenses.

Greene v. *Greene*, (1819) 4 Madd. 148; 20 R. R. 284; *Michell* v. *Michell*, (1820) 5 Madd. 69; 21 R. R. 280; *Blount* v. *Hipkins*, (1834) 7 Sim. 43; 40 R. R. 74; *Lance* v. *Aglionby*, (1859) 27 Beav. 65; *Gilbertson* v. *Gilbertson*, (1865) 34 Beav. 354; and *Kilford* v. *Blaney*, (1885) 31 Ch. D. 56, distinguished.

By his will, dated March 24, 1902, Alfred Banks appointed J. L. Busbridge and M. Adsley executors and trustees, and gave all his personal estate to Keziah Ann Banks, the widow of his deceased son Alfred H. Banks, absolutely. And the testator thereby devised two cottages to his daughter Isabella S. Richardson, and subject to that devise gave all his real estate wheresoever situate to his said trustees, "subject to the payment of my just debts and testamentary expenses," upon trusts for the benefit of Keziah Ann Banks and the children of the deceased son until the youngest of those children should attain the age of twenty-one years. At the end of the will he stated: "It is my express wish that none of my real estate shall be sold whilst there are any of my male descendants living of the name of Banks."

K. A. Banks took out an originating summons, raising,

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among other questions, the question whether the debts and funeral and testamentary expenses were payable in the first instance out of the personal estate, or whether that estate was exonerated from payment of the same.

Stuart Sankey, for the plaintiff. The bequest of personalty being specific, the rule laid down in *Duke of Ancaster* v. *Mayer* (1)—that personal estate, not specifically bequeathed, is primarily liable to the payment of debts, unless it is exempted by express words or necessary implication—does not apply here. The distinction between the effect of a specific bequest of personalty and the effect of a gift to the executor or as a residue is emphasized by *Gilbertson* v. *Gilbertson* (2) and *Powell* v. *Riley*. (3) It is sufficient if, as here, an intention can be collected from the words of the will to exonerate the personalty. If the personal estate were not exonerated, no effect would be given to the words by which the real estate is made subject to the debts and funeral and testamentary expenses, and those words should not be allowed to become insensible: *Kilford* v. *Blaney*. (4)

A. G. Mathews, for the other beneficiaries. The personal estate is the primary fund for payment of debts and funeral and testamentary expenses, and in order to exempt the personalty from payment there must be a clear intention, either expressed or to be extracted from the whole will, that the realty is to be the primary fund for payment: *Greene* v. *Greene* (5); *Michell* v. *Michell*. (6) A devise subject to debts, &c., is a mere charge, and *Greene* v. *Greene* (7) shews that "a charge for payment of debts and funeral expenses does not necessarily import more than that the testator intended that recourse should be had to the real estate for those purposes if the personal estate were insufficient"; but in that case there was also a trust or direction to sell the realty, and out of the proceeds to pay the debts, &c., and that was held sufficient to exonerate the personalty. There was also a trust for sale

(1) (1785) 1 Bro. C. C. 454.
(2) 34 Beav. 354, 357.
(3) (1871) L. R. 12 Eq. 175.
(4) 31 Ch. D. 56, 63.
(5) 4 Madd. 148; 20 R. R. 284.
(6) 5 Madd. 69; 21 R. R. 280.
(7) 4 Madd. 156.

and payment of debts in *Michell* v. *Michell* (1) and *Lance* v. *Aglionby*. (2) Here the testator has expressly prohibited the sale of his realty until a certain event has happened.

W. A. Peck, for the trustees.

BUCKLEY J. The personal estate is primarily liable for the payment of debts and funeral and testamentary expenses; but the testator may exonerate it, either by express words or by an indication of intention to be found in the will which leads to the Court being judicially satisfied that it was the testator's intention to exonerate it. It is not enough that he charges his real estate with the payment of debts. It is necessary to find, not that the real estate is charged, but that the personal estate is discharged. This need not be done by express words, but there must be found in the will plain intention or necessary implication to operate exoneration. This testator gives his personal estate to Keziah Ann Banks. He specifically devises certain real estate, and, subject to that devise, devises all his real estate to his trustees "subject to the payment of my just debts and funeral and testamentary expenses." The argument addressed to me has been, that because the personal estate, that is to say, the whole personal estate, is given to Keziah Ann Banks, I ought to find in that fact an expression of intention that the personal estate shall not bear the debts subject to which the real estate is afterwards devised. I am unable from that fact to find that intention. There is an indication to the contrary at the end of the will—namely, that the testator desires that none of his real estate be sold whilst male descendants of the name of Banks are living. In *Brummel* v. *Prothero* (3), the Master of the Rolls, Sir Richard Pepper Arden, says: "This" case "is stripped of every circumstance except that of a devise to a trustee for payment of debts and a general bequest of the personal estate to the executor. There is no one case since *French* v. *Chichester* (4), the first upon the subject, in which such words as these have been alone sufficient to exempt the personal estate. It has over and over again

(1) 5 Madd. 69; 21 R. R. 280.
(2) 27 Beav. 65.
(3) (1796) 3 Ves. 111, 114.
(4) (1707) 3 Bro. P. C. 16 (2nd ed.).

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been decided, that such words are not sufficient to raise such a demonstration as Lord Thurlow says (1) is necessary." The personal estate was there held not to be exonerated, and that notwithstanding that there was in that case, not as here a mere charge of debts, but a trust to pay the debts. The present case differs in the fact that Keziah Ann Banks is not here the executor; but this does not, I think, differentiate the case. A gift to A. is none the less a beneficial gift because A. is also appointed executor. In *Haslewood* v. *Pope* (2) there was a devise of real estate to trustees upon trust to sell so much as would raise money to discharge all the debts the testator should owe at his death, and a gift of all the personal estate to the testator's daughter, whom he made sole executrix. Lord Talbot L.C. held that the personal estate was not exonerated. I agree that there was a special reason upon which also he founded himself, namely, that the same person was donee of the personal estate and also devisee of the surplus of the real estate in tail. The passage in Mr. Theobald's book on Wills, 6th ed. at the top of p. 802 (3), is not, I think, borne out by the cases which he cites. There was in those cases, not, as would seem to be there implied, a mere charge of debts on the real estate (which is the case in the will before me), but a trust to sell the real estate and thereout pay the debts. There is nothing more here than a devise of the real estate subject to the debts. In my judgment the personal estate is not exonerated, and the real estate is only charged in aid of the personal estate.

Solicitors: *Long & Gardiner, for Montague Bradley, Dover; C. Mylne Barker, for Smith & Payn, Faversham.*

(1) In *Duke of Ancaster* v. *Mayer*, 1 Bro. C. C. 454.

(2) (1734) 3 P. Wms. 322.

(3) The passage is: "But, where the whole personal estate is given not as a residue but specifically, and the realty is subject to all the charges, to which the personalty would be liable, the personalty is exonerated; if, for instance, all the personalty is given and the realty is charged with debts, funeral expenses and costs of administration: *Greene* v. *Greene*, 4 Madd. 148; *Michell* v. *Michell*, 5 Madd. 69; *Blount* v. *Hipkins*, 7 Sim. 43; *Lance* v. *Aglionby*, 27 Beav. 65; *Gilbertson* v. *Gilbertson*, 34 Beav. 354; see *Kilford* v. *Blaney*, 29 Ch. D. 145; 31 Ch. D. 56."

F. E.

In re NELSON & CO.

BUCKLEY J.

1905

Feb. 7, 15.

[00327 of 1904.]

Company—Winding-up—Life Assurance Company—Separate Account of Premiums where other Business carried on—Reduction of Contracts—Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *ss.* 4, 22.

A company carrying on business as tea-dealers offered to customers who purchased tea from it consecutively for certain periods pensions payable during widowhood. In order to form the premium income to support the pension contracts the price of the tea was loaded with a sum of 8*d.* per pound, the total price per pound being 2*s.* 4*d.*:—

Held, that s. 4 of the Life Assurance Companies Act, 1870, was disregarded, for the 8*d.* per pound was not a separate sum capable of being carried to a separate fund appropriated for the exclusive benefit of the assured pensioners (as required by that section in the case of "a company transacting other business besides that of life assurance"), but that the 2*s.* 4*d.* per pound was a contributory sum for securing two benefits—namely, the present receipt of one pound of tea, and the expectation of a future sum of money contingent upon widowhood.

The N. Co., which carried on the joint business of tea-dealing and granting pensions to insured customers in case of widowhood, became insolvent and unable to pay the pensions. On a petition to wind up the N. Co., that company submitted, as an alternative to winding-up, a scheme which involved that a new company called the N. T. Co. should sell its tea through the agents of the N. Co. to the insured customers, and should pay 75 per cent. of the loading (6*d.* per pound) to the N. Co., which should, as between the two companies, be the insurer of the insured customers:—

Held, that the scheme, being a provision by which the insured customers were to enter into new contracts with a new company and as the result should be entitled to a reduced benefit from their contracts with the old company, was not authorized by s. 22 of the Life Assurance Companies Act, 1870.

Semble, that although absolute arithmetical equality is not required by s. 22, what the section allows is the reduction of all the contracts of the company to the relief of the common debtor, and that a scheme which proceeds upon a principle of inequality of reduction is not within the Act.

NELSON & CO., LIMITED, was registered on July 11, 1901, under the Companies Acts, 1862 to 1900, as a company limited by shares, with a capital of 101,000*l.* divided into ordinary shares of 1*l.* each.

Amongst the objects of the company stated in its memorandum of association were the following:—

(*a*) To acquire the business of one Rasmus Jensen, trading

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as Nelson & Co., tea-dealers (but so far only as the same related to tea), and to take over and confirm all contracts entered into by the vendor in connection with that business, and for that purpose to enter into and carry into effect an agreement shortly afterwards entered into between Jensen and the company:

"(*b*) To carry on the business of tea, coffee, cocoa merchants, general grocers, provision dealers, wine and spirit merchants and beer retailers, furniture and drapery business, boot and shoe dealers, and generally to deal in all commodities appertaining thereto:

"(*c*) To effect insurance for life, accident, and sickness, to issue pensions and old age pensions, and generally to transact and carry on the business of insurance in all its branches."

Clause 110 of the articles of association was as follows: "The directors shall set aside three-fourths of the profits earned by the company in each week as a fund to meet the liabilities of the members' customers' cards issued or to be issued by the company, and the sum so set aside shall be applied in discharge of the current liabilities thereunder, and in so far as in any week the whole amount shall not be distributed, the balance shall be carried forward, and may be applied at the discretion of the directors to make good any deficiency in any future week or weeks in respect of such pensions. But the company is not to be under any liability in respect of the said pensions beyond the amount of the three-fourths of the profits so to be earned by the company; and if in any week the three-fourths of the profits shall be insufficient for the payment in full of the said weekly payments the same may, at the discretion of the directors, be abated rateably, or such deficiency may be made good out of any fund accumulated as hereinbefore directed. Subject to the setting aside of the said three-fourths of the profits," the directors might before recommending any dividend set aside out of the profits of the company such sums as they thought proper as a reserve fund to meet contingencies, with "power to employ the assets constituting the reserve fund in the business of the company, and that without being bound to keep the same separate from the other assets."

Subsequently this article was altered by special resolution,

and an "augmentation fund" was formed. In the terms of the new article the directors were to set aside three-fourths of the net profits in each quarter of a year from any other source, including those from the sale of coffee, &c., and carry the same to that fund.

The agreement referred to in the memorandum of association was dated September 19, 1901, and was made between Jensen and the company. Under it the company purchased Jensen's tea business, including "the full benefit of all pending contracts and engagements to which the vendor is or may be entitled in connection with the said business"; and the consideration for the sale was to be (*a*) 100,000*l*., payable to Jensen by the issue to him of 100,000 fully paid shares in the company, and (*b*) the undertaking by the company to pay, satisfy, discharge, and fulfil all the debts, liabilities, contracts, and engagements of the vendor in relation to the tea business, and to indemnify him against all proceedings, claims, and demands in respect thereof.

Nelson & Co. (the predecessors of the business) had an insurance scheme in connection with its tea business. As "Nelson & Co., the Great Tea Men," they issued penny "purchasers' cards" to married women buying tea from them, in which, "in commemoration of the sixty years' reign of Her Most Gracious Majesty, Queen Victoria, the greatest and most noble Widow the world has ever known," the firm agreed that they would "pay to every woman who shall have become a widow since Christmas, 1897, and who since that date shall have purchased not less than one half-pound of their tea per week for the last five consecutive weeks previously to her becoming a widow, 10*s*. per week as long as she remains a widow; and to every woman who became a widow previously to Christmas, 1897, or previously to her commencing to purchase Nelson & Co.'s tea, 10*s*. per week as long as she remains a widow, provided that she shall have purchased half a pound of tea per week for ten years." The card also said: "Customers who require only a quarter of a pound of tea weekly, and purchase the same under the above conditions, will receive 5*s*. per week instead of 10*s*."

Nelson & Co., Limited (below called the limited company or the insurance or insuring company), paid into court the sum of

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20,000*l.* required to be deposited under the Life Assurance Companies Act, 1870, s. 3, and in July, 1901, commenced business, and proceeded to issue purchase cards to its tea customers. The first cards issued were as follows:—

"NELSON & Co., LIMITED.
The Great Tea Men.
(Registered under the Companies Acts, 1862 to 1900.)
"Purchaser's Card. Price 1*d.*

Mrs. . . . . .
Address . . . . . .
Branch . . . . . .

"The entries on the card must correspond with the books of the company, such books being considered the only proof of the fact of the consecutive purchase of the tea."

"Registered Offices: James Street, Louth, Lincs."

"20,000*l.*—This enormous sum has been deposited with the British Government as a guarantee of the stability and bona fides of the company. Apart from this 20,000*l.*, Nelson & Co., Limited, hereby agree to set aside 75 per cent. of their net profits for the payment of widows' pensions, which, as will be seen from the certificate below, more than meets the amount required to pay the pensions. [An accountant's certificate then followed.] Nelson & Co., Limited, the Great Tea Men, will pay, subject as mentioned below, 10*s.* per week to every woman who has purchased not less than ½ lb. of their Pension Tea for 52 consecutive weeks next previous to her becoming a widow, and such payments shall be continued so long as she remains a widow and continues to buy ½ lb. of tea from Nelson & Co., Limited, in each week.

"Similarly, 10*s.* a week to every woman who became a widow previously to her commencing to purchase tea from Messrs. Nelson & Co. or from Nelson & Co., Limited, provided she should have purchased ½ lb. of tea per week for 10 years, and such payments shall be continued so long as she remains a widow and buys ½ lb. of tea each week.

"Customers who require only ¼ lb. of tea weekly, and

purchase the same under the above conditions, will receive 5*s.* instead of 10*s.* per week.

"*No Medical Certificate required.*

"It must be clearly understood that the widows' right shall be limited to receiving the payment of their pensions rateably out of 75 per cent. of the net profits on tea, and the funds accumulated therefrom (see accountant's certificate on other side) to be set aside for this purpose by Nelson & Co., Limited, and the pensioners shall have no rights against the company otherwise than as against the said 75 per cent. of the net profits and the funds accumulated therefrom.

"No person shall be entitled to more than one pension from either Nelson & Co. or Nelson & Co., Limited.

"Purchases may be marked in advance for customers' convenience, but benefits only attach as the actual dates arrive.

"Agents have no power to waive any of these conditions."

On each card were columns for the insertion of the dates and amounts of the consecutive purchases of tea.

Slight variations were made in the cards issued after February, 1902, and before November, 1902.

In cards issued after November, 1902, in place of the statement as to the 20,000*l.*, there was the following statement: "40,000*l.* has been invested in Government securities by Nelson & Co., Limited, on behalf of their widows, and this sum is being added to every three months."

The conditions of payment were also altered—e.g., the purchases had to be made by "married" women themselves; the written permission of the board of directors was required before a woman could benefit by insurance if her husband was out of the United Kingdom; the husband was required to be not over sixty-five years at the commencement of the continuous taking; a pension was to be payable only until the pensioner assigned or charged it; and every claim to a pension had to be sent in within twenty-one days after the husband's death.

A subsequent form of card stated that 60,000*l.* had been invested in "Government and other securities," and it was required that the husband should not be more than fifteen years older than his wife.

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Later on the form of card stated that the company would "pay out of the 75 per cent. net profits and reserve fund a maximum pension of 10*s.* per week" to the purchasers of the half-pound, or a "maximum pension of 5*s.*" to the purchasers of the quarter of a pound, and some other slight alterations were made in the conditions.

Between the period ending December 31, 1901, and the period ending September 26, 1903, the sums paid in respect of annuities did not equal the 75 per cent. of profits; but after September, 1903, the pensions so increased that 75 per cent. of the profits was insufficient to pay the pensions.

The following statements with reference to the limited company's scheme of insurance and the circumstances under which the company became insolvent are taken from the judgment of Buckley J.:—

"The business of Nelson & Co., Limited, may be described as that of attracting married women to become customers of the company and purchasers of the company's tea at prices largely—say, 40 per cent.—above its fair market value, by the delusive and reckless promise of impossible pensions to be paid to them if and when they became widows. The pension scheme rested upon no actuarial basis of any kind. It ignored the age of the husband on whose death the pension would commence; it ignored the age of the wife during whose widowhood it would be payable; it ignored, with some exceptions, the health and expectation of life of the husband. The loading, which was added to the price of the tea, and which may in a sense be regarded as the premium paid for the annuity contract, bore no actuarial relation whatever to the liability which the company was undertaking. Under no circumstances could it have justified a pension of anything approaching 10*s.* a week. If the customers had known that they were overcharged 8*d.* a lb. for tea, and in the result might possibly during widowhood receive a pension of, say, 6*d.* a week, the number of the company's customers would probably have suffered considerable reduction. Even the 8*d.* a lb. did not go to provide for the annuity contracts—it went into the general business; and, under the limited company's

contracts, the policy-holders could look only to 75 per cent. of the profits realized by its employment with the company's other funds in the business. The offer which the company made was a mere reckless promise of an impossible pension with a view to induce persons to become customers. The company was incorporated on July 11, 1901. It took over the business of a man named Rasmus Jensen. At that date Jensen had some 150,000 to 200,000 customers, and had become liable to pay pensions to a large number of widows. There is some difference between those who began purchasing tea in Rasmus Jensen's time, and whose contracts were taken over by the limited company, and those who began purchasing from the limited company after July, 1901. It is not material to state the difference accurately for the purposes of this judgment. The most material point is that, from the time of its incorporation, the limited company only offered payment out of a fund—namely, 75 per cent. of the company's net profits on tea. The originators of the scheme had not miscalculated the credulity of the public to whom they appealed. The number of customers increased rapidly, and ultimately reached something like 500,000 or 600,000. The number of widows who became entitled to pensions increased with like rapidity; and at the date of this petition there were about 12,696 widows entitled to 10*s.* a week, and 7084 widows entitled to 5*s.* a week, making a total of upwards of 19,000 widows entitled to pensions, which aggregate to a sum of between 8000*l.* and 9000*l.* a week. There is actuarial evidence which is altogether uncontroverted that the reserve which this company should have had to meet the pensions thus payable, and the company's prospective liability in respect of current contracts which might result in pensions, is nearly 30,000,000*l.* sterling. The figure is not accurate, and cannot be made accurate without knowing the ages of the lives, a detail which . . . . the company ignored. Making large deductions, as, for instance, a deduction on the footing that, say, 75 per cent. of the persons who are now buying tea will cease to buy, and thus cannot become entitled to pensions, and making certain other allowances, the reserve ought to be a sum measured at

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any rate by millions—10,000,000*l.* would seem to be about the lowest sum. To meet this gigantic present and prospective liability the company have available for the annuitants less than 20,000*l.* There is the statutory deposit of 20,000*l.*, and, further, a sum of about 2782*l.* to the credit of the widows' pension fund. But from these has to be deducted a sum of 3358*l.*, which the company says has been paid to widows over and above the share of profits to which they were entitled. The amount available is thus something under 20,000*l.*, a sum sufficient to pay, even in respect of the present current pensions alone, the amount due to them for little more than a fortnight."

In December, 1904, a petition, intituled, "In the Matter of the Companies Acts, 1862 to 1900, and In the Matter of the Life Assurance Companies Act, 1870," and in the matter of the company, was presented, and prayed that the company might be wound up by the Court.

The petitioners were a widow who had become entitled to a pension by having purchased tea from the limited company for sixty weeks prior to the death of her husband, a married woman who had commenced to subscribe to the insurance scheme of Nelson & Co. in 1900, and a person who commenced as a widow to purchase from Nelson & Co. in 1899.

When the petition came on it was admitted that the company was insolvent; but the Court was asked by the company not to wind it up, but to sanction, with or without modification, a scheme which was said to be a scheme for the reduction of the company's contracts under s. 22 of the Life Assurance Companies Act, 1870.

On November 10, 1904, there had been registered under the Companies Acts, 1862 to 1900, a company called the Nelson Trading Company, Limited, which had a nominal capital of 100,000*l.* divided into shares of 1*l.* each, and the objects of which were (inter alia) to carry on a number of businesses, including those of general dealers, tea dealers, universal providers, and co-operative stores, and to carry on the business of "insurance of every kind in all its branches, and to enter into any arrangements with any insurance company for the insurance of any

persons having dealings with the company"; also to issue such "deeds, instruments, or writings, and to make all such arrangements with policy-holders and others as may be necessary or expedient for carrying out the purposes herein provided."

The trading company had also power under its memorandum to acquire all or any part of the business, property, or liabilities of any company carrying on any business which the trading company was authorized to carry on.

By the trading company's articles of association the company was forthwith to enter into an agreement, then in draft, which was described as "an agreement with Nelson & Co., Limited, providing for the insurance by that company of sums to become payable to the insured customers as therein defined of this company, and allowing this company to sell its tea and transact business through the medium of the agents of Nelson & Co., Limited, and providing for the payment to Nelson & Co., Limited, of a sum equal to 85 per cent. of the net profits of this company on the sale of tea."

The agreement referred to was entered into on November 11, 1904, between the limited company (thereinafter called "the insurance company") and the Nelson Trading Company, Limited (thereinafter called "the trading company"). After reciting that the trading company was about to establish a retail tea business and desired to offer to its customers the benefit of life insurance, and had requested the insurance company to grant insurances and to facilitate the operations of the trading company as thereinafter provided, it was agreed to the following effect: (1.) That when the husband of any insured customer of the trading company died the insurance company was to pay to his widow the full, half, or quarter sum mentioned in a table, if she was entitled to full, half, or quarter benefit as the case might be. An insured customer on admission became entitled to quarter benefit, after buying tea for thirteen consecutive weeks she became entitled to half benefit, and after fifty-two weeks' consecutive purchases she became entitled to full benefit. The sums payable depended on the amount of tea purchased and the age of the husband. (2.) An insured

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customer was defined as a married woman who had received from the trading company a certificate of registration as an insured company, and had up to the death of her husband complied with certain conditions, including that of having purchased tea from the date of her certificate. (8.) The trading company in respect of every pound of tea sold by it was to pay on the usual quarter days to the insurance company by way of premium the sum of 6*d.*, and all sums so paid were to be set aside as a special fund for securing payment of all sums from time to time becoming payable to insured customers, with power for that company, when the fund was actuarially certified to be sufficient to meet their liabilities, to apply the whole or any part of the excess, as to one half in paying the same to the insured customers, in such manner and proportions as the directors of the trading company might determine, and as to the other half in augmenting the general fund of the insurance company. (9.) "The insurance company shall during the continuance of this agreement allow the trading company to sell the trading company's tea through the medium of the insurance company's agents, and for the purpose of carrying on the trading company's business in relation to the sale of tea . . . ." (10.) "In consideration of the privileges to be accorded to the trading company by the last preceding clause, that company shall at the end of" each quarter, "or so soon thereafter as practicable, pay to the insurance company a sum equal to 85 per cent. of the trading company's net profits on the sale of tea during such quarter, and in calculating such profits all due allowance shall be made for the trading company's expenses and outgoings in relation to the purchase and sale of tea, and for management and administration expenses, and for insurance premiums hereunder, and otherwise . . . . But the trading company's obligations under this clause shall cease if and when an effective resolution is passed or an order made for the winding-up of the insurance company." (13.) "This agreement shall continue in operation until determined by mutual arrangement, or until an order is made or an effective resolution is passed for the winding-up either of the insurance company or of the trading company, and . . . . if

so terminated the assets then constituting the said special fund mentioned in clause 8 hereof shall be divided amongst the insured customers of the trading company in equitable proportions to be determined in case of difference by some person nominated" as therein mentioned, "and such decision shall be in full satisfaction of all claims of the trading company hereunder."

The petition was mentioned in Court on January 24, 1904, when it was intimated that the company intended to ask the Court to sanction a scheme for reduction of the amounts of the limited company's contracts under s. 22 of the Life Assurance Companies Act, 1870. The Board of Trade was, by consent, joined as a party to the proceedings, and the petition stood over for fourteen days, facilities being offered for the consideration of the proposed scheme by the Board of Trade and the petitioners.

The scheme submitted on behalf of the limited company as a substitute for winding-up provided as follows:—

"(1.) Nelson & Co. shall from the date of the order approving this scheme cease to be a trading company except as hereinafter provided.

"(2.) All the customers of Nelson & Co. who are not already widows shall be taken over for trading purposes by the Nelson Trading Company, and shall be insured by Nelson & Co. (hereinafter referred to as 'the insuring company') for fixed sums on the deaths of their husbands in accordance with the rates and conditions shewn on Table C of the trading company's tables of insurance.

"(3.) All customers who are prepared to sign the declaration of health attached to the trading company's card shall be insured for fixed sums in accordance with the terms and conditions set forth in Tables A and B.

"(4.) Immediately this scheme is approved all customers of the insuring company who have continued purchasing tea up to this date shall become entitled to half benefits according to their respective rates and conditions of insurance.

"(5.) The trading company shall not take any new customers except on the terms of such customers signing the said declaration of health . . . .

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"(6.) In order to provide against any disturbance of the averages produced by possible losses on bad lives taken over under Table C, the insuring company shall be at liberty to make such diminution from time to time in the payments provided for by Table C as may be necessary for the security of the class insured under the said table, the amount of the diminution (if required) to be certified by the actuary of the insuring company, who shall make such investigation into the working of this fund as often as may be necessary to enable him to make provision to keep up its financial equilibrium.

"(7.) In order to provide security, or guarantee the immediate falling in of claims of customers taken over, a credit of 10,000*l.* beyond the resources at disposal for meeting the same shall be opened at a bank in the names of two trustees, one to be appointed by the person liable for such credit (hereinafter called 'the guarantor') and the other by the petitioners' legal advisers. Such credit, in so far as the same shall not have been used or appropriated under the actuary's certificate, shall be released at the expiration of twelve months from the day of approval, and such amount as shall have been used or appropriated for paying or providing for claims emerged or expected shall be refunded (but without interest) to guarantor from the insurance fund and the general reserve fund of the insuring company hereafter mentioned as and when the actuary of the company shall certify that such payment can be safely made.

"(8.) All sums standing to the credit of the widows' pension fund at the date of approval shall be applied first in payment to widows who have not received back in pensions sums equivalent to the premiums paid by them, or the amounts necessary to make good such premiums.

"(9.) The balance of such funds shall be paid into and form the nucleus of a fund to be called 'The New Widows' Pension Fund,' and the present widows' pensions fund shall be closed.

"(10.) The new pension fund shall be augmented within three months of the date of approval by a sum of 3000*l.*, to be provided by the shareholders of the insuring company.

"(11.) A further fund shall be created, called "The Ten Years' Fund,' and a further sum of 5000*l.* shall be provided

therefor by the said shareholders within such period of three months as aforesaid.

"(12.) In order to obtain the benefits of the said funds, widows who are entitled to pensions at the date of approval and ten years' widows shall continue to purchase tea from Nelson & Co., and sales of tea to such widows shall be the only trading carried on by the insuring company after the said date.

"(13.) The arrangement between the insuring company and the trading company shall provide as follows, and the present agreement shall be varied and supplemented as far as may be necessary therefor:—

"(1.) A sum of 6*d.* for every pound of tea sold by the trading company shall be paid to the insuring company, and such sums shall be carried by the insuring company to its insurance fund.

"(2.) Eighty-five per cent. of the net profits of the trading company shall be paid to the insuring company.

"(3.) Ten per cent. of the net profits shall for five years from the date of approval be applied in providing working funds for the trading company.

"(4.) Five per cent. of the net profits shall be available for distribution as dividend among the shareholders of the trading company.

"(5.) The said 85 per cent. of the net profits paid to the insurance company shall be placed to the general reserve fund of the insurance company, to be applied as the actuary of the company shall from time to time advise in the payment of bonuses to customers of the trading company and in the creating of a reserve or otherwise.

"(6.) After the expiration of five years from the date of approval 70 per cent. only of the said net profits shall be available for the purpose of the last sub-clause; the balance shall be available for dividends for the shareholders of the insuring company.

"(7.) As and when the actuary of the company shall certify that the widows' fund and the ten years' fund are larger in amount than is necessary for the purposes of such funds, the

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amount of such excess shall from time to time be deemed to form part of the 85 per cent. of the net profits of the trading company, and shall be dealt with accordingly."

The petition was heard on February 7.

Eve, K.C., and *Ward Coldridge*, for the petitioners, asked for a compulsory winding-up order.

Astbury, K.C., and *E. O. Simpson*, *W. Finlay*, *Frank Dodd*, and *Eldridge*, for persons supporting the petition.

R. J. Parker, for the Board of Trade, pointed out various objections to the proposed scheme, and submitted to the Court whether it should be sanctioned subject to such modifications as the Court should think fit to make.

Buckmaster, K.C., and *R. Rowlands*, for the company. In the interests of the insured customers a scheme of some kind ought to be sanctioned; they will get nothing if a winding-up order is made. The goodwill of the company as a trading company is valuable, and that will disappear altogether if the order is made.

If the scheme as it is presented is unworkable or unfair, the Court can sanction it subject to its being modified in any way the Court desires; but it has been framed with a view to benefiting the insured customers, and there is evidence that it is actuarially sound.

[BUCKLEY J. Under the insurance scheme of the old company, which substantially is to be continued under the scheme, is it possible to comply with s. 4 of the Life Assurance Companies Act, 1870?]

Life assurance is nowhere prohibited by any statute, although certain restrictions are imposed on companies carrying it on by the Acts of 1870 and 1872. If the business is so carried on that the terms of the statutes do not apply, the business is not illegal. If, therefore, contracts are made for the receipt of sums derived from a fund created by the indeterminate profits arising from the sale of goods, no premiums are in fact paid, and the provisions of s. 4 of the Act of 1870 do not apply.

An objection that the profits might be reduced to nil by arbitrarily increasing the price of tea would be met by inserting in

the scheme some machinery by which the Court or some other authority might retain control as to the variation of prices.

There is nothing in s. 22 of the Act of 1870 which prevents such a scheme being sanctioned.

Eve, K.C., in reply, referred to *In re Great Britain Mutual Life Assurance Society*. (1)

BUCKLEY J. declined to sanction the scheme, made a compulsory winding-up order against the company, and said that he would state his reasons on a future day.

Feb. 15. BUCKLEY J., after giving the history of the company and stating that it was in a state of hopeless insolvency, concluded his judgment as follows:—Upon every ground a stop ought to be put to such a company in such hands carrying on such a system of business as this. In the interest of the unfortunate victims, however, the Court is asked to consider a scheme of reduction of contracts under the Life Assurance Companies Acts. A scheme has been brought in. It is, in my opinion, open to insuperable objections upon several grounds. In the first place, it involves that this company shall continue business—a course to which, in the absence of overpowering reasons in the interest of the customers, I should not accede. Secondly, it proceeds upon the footing that a system of business shall be continued by which customers shall be attracted to become purchasers of tea at a price loaded with a sum to represent the premium on the insurance benefit, such sum, however, not being payable as a premium capable of being dealt with in manner required by s. 4 of the Life Assurance Companies Act, 1870, but included in a lump sum which is to be dealt with in manner indicated in the scheme. Stating it in figures, the matter would stand somewhat thus: The tea purchased by the company costs, it is said, 1*s.* 3*d.* to 1*s.* 5*d.* per lb., and would fairly be retailed at 1*s.* 8*d.* per lb. Sale of the tea was made, and would under the scheme continue to be made, at 2*s.* 4*d.* per lb., thus providing a loading of 8*d.* per lb. to form the premium income to support the annuity contracts. The scheme

(1) (1881) 19 Ch. D. 39; affirmed (1882) 20 Ch. D. 351.

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involves that a new company called the Nelson Trading Company, Limited, shall sell the tea and shall pay 75 per cent. of the loading (6*d.* a lb.) to this company (Nelson & Co., Limited), which shall, as between the two companies, be the insurer of what is called the insured customer of the Nelson Trading Company, Limited. A scheme of that kind is, to my mind, not a reduction of contracts of Nelson & Co., Limited. It is a scheme under which the customer, if he is minded to make a new contract with the Nelson Trading Company, Limited, is to be entitled to a reduced benefit out of his previously existing contract with Nelson & Co., Limited. This is not, in my opinion, within s. 22 of the Life Assurance Companies Act, 1870. That section authorizes a reduction of the contract between A. and the company, but not a provision by which A. shall enter into a new contract with a new company, and as a result of that shall be entitled to a reduced benefit from his contract with the old company. Again, s. 4 of the Life Assurance Companies Act, 1870, requires that a separate account shall be kept of all receipts in respect of the annuity contracts, and that the receipts shall be carried to and form a separate fund absolutely the security of the annuity-holders. The scheme of business which I am now asked to wind up, and the scheme of reduction which I am asked to approve, is one under which the payment which the assured makes by way of premium is not a separate sum capable of being kept separate and appropriated, as required by s. 4. The 2*s.* 4*d.* per lb. which she pays is what I may call a contributory sum for securing two benefits—the present receipt of one pound of tea and the expectation of a future sum of money contingent upon widowhood. I do not think that this is consistent with the Act of Parliament. Another fatal objection is that, as counsel for the company conceded, the reduction of the contracts which they propose is a reduction of inequality as between the policy-holders. That which the Act allows is the reduction of all contracts to the relief of the common debtor, but not a reduction which operates in inequality as between the common creditors. I do not mean that absolute arithmetical equality must be ensured, but a scheme which proceeds upon a principle of inequality of

reduction is not, I think, within the Act. Again, as is pointed out in the report made by Mr. Ackland to the Board of Trade, no sort of benefit is granted to the existing customers of the company which is not granted to new customers, unless it may be a trifling advantage in admitting the old customers to benefits within the first year.

Other objections there are of a commercial rather than a legal character. Thus, as a matter of business, it is, I think, idle to anticipate that the new trading company could as a trading company ever legitimately get capital for its undertaking upon the terms proposed—namely, that 95 per cent. of its profits should be handed over under the scheme, and 5 per cent. of its profits should be the only fund for expectation of dividend. Again, there is no practical means of ensuring that the trading company shall not so work its business, or so prepare its accounts, as that its net profits shall, as Mr. Ackland says, be whittled down to practically nothing. A suggestion was made by counsel for the company that some machinery should be provided by which this Court, or some authority, should retain control over the price which the company should charge for its tea, and to ensure that the present system should not continue, under which the tea-dealing company should be bound to buy all its stock from particular persons, of course to their profit. Such suggestions, to my mind, are illusory. Another objection which weighs strongly with me is that the effect of this scheme is to create what I may call a tied insurance business—a system under which customers are to pay too much for their tea upon the terms that the excess shall be taken by them, not to such insurance office as they like, to insure an annuity, but that they shall be tied to Nelson & Co., Limited, being such a company as I have described, as their insurers. I see no advantage, but every disadvantage, to the customer in this provision. It is said, on the other hand, that to reject any such scheme is to throw away the value of what is called—using a term singularly inappropriate to the facts of this case—the "goodwill" of the company, and that the widows, being confined to 75 per cent. of the profits, can get nothing in the winding-up beyond the 20,000*l.* As to the

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latter, I am not sure that this is so; but I say no more upon the point, for it may well have to be considered in the course of the winding-up. I am clear, however, that, even if this be so, it is more to the interest of the policy-holders to put an end at once to this concern, even if that which they get out of the wreck be but a small sum. For these reasons I think that the scheme for reduction of contracts is impossible and cannot be approved, and I therefore at the conclusion of the argument pronounced a winding-up order.

Solicitor for petitioners: *L. Weatherley.*

Solicitors for persons supporting petition: *Helder, Roberts & Co., for Simpson & Co., Leeds; Smiles & Litchfield; Oswald Bird & Co.; R. R. G. Norman.*

Solicitors for company: *Baker, Baker & Co.*

Solicitor for Board of Trade: *Solicitor to Board of Trade.*

F. E.

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In re BADGER. MANSELL *v.* VISCOUNT COBHAM.

[1904 B. 4800.]

Literary and Scientific Institutions—User for Social Purposes—Billiards—Repairs—Borrowing Powers—Literary and Scientific Institutions Act, 1854 (17 & 18 *Vict. c.* 112), *ss.* 18, 19, 33.

The Literary and Scientific Institutions Act, 1854, does not authorize the establishment of institutions for the purpose of recreation or enjoyment, *e.g.* the playing of billiards, as distinguished from the literary, scientific, and other instructional purposes specified in s. 33 of the Act.

An institution established under the Act has no implied general power of mortgaging or borrowing money, and its power to mortgage or charge its property is limited to the purposes mentioned in s. 19.

Money cannot be borrowed on mortgage by a literary or scientific institution for the purpose of erecting a billiard-room, although it may be so borrowed for the purpose of making necessary repairs of the institution's buildings.

By a deed dated September 4, 1857, and made between Richard Badger of the first part, Samuel Brooks of the second

part, and J. H. H. Foley of the third part, after reciting that the parties of the third part were the trustees of an association established at Stourbridge called the Stourbridge Mechanics and Working Man's Associated Institute, and that the hereditaments thereinafter described were convenient to be purchased and used for the purposes of the institute and for the rooms and offices necessary for carrying on the business and objects of the institute, there were, for valuable consideration, conveyed to the trustees in fee certain land and a messuage and outbuildings thereon, to hold the same for the purposes of the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), "and to be applied as a site for the rooms and offices of" the institute, "to be under the management and control as regards" the bulk of the property conveyed "of a committee to be annually elected" as therein mentioned.

The institute was carried on for many years, and at the date of the proceedings mentioned was called "The Stourbridge Institute." It had certain "laws" and "by-laws."

The material laws were as follows:—

"1. The Stourbridge Institute is established for the promotion amongst its members of literature, science and art, and for instruction by means of libraries, reading-rooms, exhibitions, lectures, classes, examinations, innocent recreations, and such other means as may from time to time be available."

"5. The institute shall be managed by a council, consisting of president, vice-presidents, treasurer, and eighteen other members, to be elected at the annual general meeting. . . ."

"8. The council shall have power . . . . (3.) to build, buy, hold, rent, or hire such buildings and premises as may be necessary for the purposes and objects of the institute, and to manage or let the same . . . . (7.) to exercise such other powers as shall from time to time be vested in the council at general meetings of the members of the institute, and generally to manage the affairs of the institute."

"16. All the personal property of the institute shall be vested in the council for the time being.

"17. The persons to sue and be sued on behalf and in the

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name of the institute shall be the treasurer and secretary thereof for the time being jointly."

One of the by-laws provided that any ale, stout, cider, claret, or other refreshments bought on the institute premises should be consumed thereon.

In 1894 Viscount Cobham and some other persons became trustees of the institute.

Many years before 1904 a billiard-room was provided upon the institute premises, and had been largely used by members. It was an upstairs room, and owing to its constant use and to the age of the buildings the floors and walls became unsafe, and owing to the low ceiling of the room it was insufficiently ventilated. The council proposed to erect a new billiard-room on the ground-floor, and to repair and reconstruct the existing billiard-room so that it might be used for other purposes, or (if it was found impracticable to erect a new billiard-room) for its present purposes. The estimated cost of the full scheme was 800*l.*, and that of reconstructing and repairing the old billiard-room was 300*l.*

In February, 1904, the council passed, by a large majority, a resolution purporting to give the governing body power to raise the necessary funds by mortgage of the premises of the institute, and in October, 1904, the trustees passed a resolution that they were willing, if they could legally do so, to create a charge on the lands held by them "for the purpose of repairing and altering the institute buildings, and erecting further accommodation for billiards and other games," subject to the conditions (1.) that the trustees incurred no personal liability; (2.) that the council should obtain the decision of the proper Court on the question whether the trustees had power to create the charge for the purposes above mentioned.

An originating summons, intituled in the matter of the deed of 1857, was accordingly issued, S. Mansell and A. G. Thornburrow (the treasurer and secretary of the institute), "suing on behalf of the above-named Stourbridge Institute," against Viscount Cobham and the other trustees, asking (1.) that the following question might be determined, namely, whether the institute, or the council or trustees thereof, had power to

charge the premises comprised in the trust deed for (*a*) "the enlargement and improvement of the buildings and club premises of the institute, and (*b*) necessary repairs to the said buildings and premises"; (2.) that the trustees might be authorized to concur with the council in executing a proper mortgage of the institute premises for the purpose aforesaid, and that such mortgage might be sanctioned by the Court.

The summons was adjourned into Court.

Buckmaster, K.C., and *H. C. Seddon*, for the plaintiffs. An institution like this is not a charity, and but for the Act of 1854 it would not have been lawful for it to hold land: see *In re Dutton*. (1) Sect. 1 of the Act rendered it lawful to grant a conveyance of any quantity not exceeding one acre of land "as a site for any such institution as hereinafter described," and s. 11 enables the grant to be made to trustees for the purpose of the institution. Sect. 13 gives a form of conveyance which may be used, but is not obligatory. Sect. 18 gives power to the trustees, with the consent of the governing body, to sell any land or building if it shall be deemed advisable to sell it. Sect. 19 says that trustees "who, by reason of their being the legal owner of the building or premises, shall become liable to the payment of any rate, tax, charge, costs, or expenses, shall be indemnified and kept harmless by the governing body" of the institution "from the same, and in default of such indemnity shall be entitled to hold the said building or premises and other property vested in them as a security for their reimbursement and indemnification, and, if necessity shall arise, may mortgage or sell the same, or part thereof, free from the trusts of the institution, and apply the amount obtained by such mortgage or sale to their reimbursement, and the balance (if any) to the benefit of the institution." Sect. 21 points out how suits and actions by and against institutions under the Act are to be brought. By s. 30, upon dissolution any property remaining after satisfaction of debts and liabilities is not to be distributed among the members, but is to be given to some other institution. Sects. 31 and 32 give the meaning of the

(1) (1878) 4 Ex. D. 54.

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words "member" and "governing body," and s. 33 points out the institutions to which the Act is to apply.

The power to sell includes the power to borrow for the purposes of the institution.

[BUCKLEY J. There is a special power to mortgage in s. 19, where the trustees are liable, "by reason of their being the legal owner," for such things as rates and taxes.]

Would not the section apply to the expenses of repairs?

[BUCKLEY J. The obligation to repair would not arise by being legal owner.]

The trusts are not absolutely limited to the purposes mentioned in the statute, as the institute has also its own "laws."

[BUCKLEY J. If they are outside the Act, that will not help you. On what principle do you get the power to borrow?]

If what is intended to be done is one of the lawful objects of the institute, that object may be effectuated by borrowing.

Whitmore Richards, for trustees who approved of the alterations. The express power to sell given by s. 18 includes the general power to mortgage: *Stroughill* v. *Anstey*. (1)

Astbury, K.C., and *Arthur Underhill*, for the trustees who did not approve of the building of the new billiard-room. The Act only permits something to be done which would otherwise be illegal, and the trustees can only hold the land for the purposes authorized by the Act. The so-called "laws" of the institute, so far as they are not justified by the Act, are ultra vires: *In re Bristol Athenæum*. (2)

An express power to build and repair would not authorize such a building as is contemplated, for billiard-playing is not one of the purposes specified in s. 33, and social clubs are not within the Act. The express power to borrow is limited to the purposes mentioned in s. 19.

[BUCKLEY J. If the trustees expended their own money in making necessary repairs, would they not have a charge on the building of the institute for their costs, charges, and expenses?]

(1) (1852) 1 D. M. & G. 635. (2) (1889) 43 Ch. D. 236.

They are only bare trustees. At most, only the expenses of proper preventive repairs should be allowed.

BUCKLEY J. Under a deed of September 4, 1857, certain gentlemen, as trustees of this institution, which is now called the Stourbridge Institute, became grantees of certain lands which were conveyed to them "for the purposes of the said recited Act," that Act being the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), "and to be applied as a site for the rooms and offices" of the institute, "to be under the management and control" of a committee to be annually elected. The institute is governed by that Act, which by s. 1 authorizes certain institutions to acquire land, by purchase or gift, not exceeding one acre in extent, as the sites for such institutions. The institutions referred to are detailed in s. 33 of the Act and include those which are established, amongst other things, for the promotion of science, literature, the fine arts, and the diffusion of useful knowledge. It is unnecessary to state the whole of the purposes set forth; it is sufficient to say that no words of the section authorize the establishment of institutions for recreation or enjoyment as distinguished from instruction. In recent years this particular institution has somewhat gone beyond the bounds of the statute by establishing in its building card-rooms, a billiard-room, and facilities for playing ping-pong. It appears that the roof of the billiard-room is low, and for purposes of ventilation and so on it is deemed advisable to build a new billiard-room on the ground-floor, or in the alternative to raise the height of the roof and to make other improvements. This is an excellent thing in itself. The society has not the money wherewith to carry out the suggested alteration. The majority of the members wish that money should be borrowed for the purpose; the minority say that the society has not the power to borrow money for this particular purpose. The first question is, has the society the power to borrow money for the purpose of enlarging and improving the premises of the institute in the manner I have mentioned? In my judgment it has not, and I base my decision on two grounds. In the first place, as

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I understand the law, primâ facie a commercial company, or a trading company, has, as has been said more than once, an implied power to borrow money for the purposes of its business if such borrowing is not expressly prohibited. The fact that that proposition has been confined to commercial or trading companies goes strongly to shew that a power to borrow is not implied where the body in question is other than a commercial undertaking. This institution is not a commercial undertaking. In my judgment it has no implied power to borrow for the purpose I have indicated, and certainly no express power to do so. I should come to the conclusion that there was no implied power to borrow if the Act gave no power to borrow for any purpose, but s. 19 does give power to the trustees to mortgage the building or premises of the institution for certain purposes not including this purpose. The section says that the trustees, "who, by reason of their being the legal owner of the building or premises, shall become liable to the payment of any rate, tax, charge, costs, or expenses, shall be indemnified and kept harmless by the governing body" of the institution "from the same, and in default of such indemnity shall be entitled to hold the said building or premises and other property vested in them as a security for their reimbursement and indemnification, and, if necessity shall arise, may mortgage or sell the same, or part thereof, free from the trusts of the institution." That is a special power addressed to something which is not this particular purpose. Beyond that, subject to limitations which I will presently mention, the trustees have no power to borrow money. The second ground on which I base my judgment is this. Looking at s. 33 of the Act, it seems to me that providing a billiard-room is outside the purposes which the Act contemplates, and that the words of the section shew that the development of an institution of the kind therein mentioned into a social club is not authorized by the Act. An argument has been addressed to me in support of the plaintiffs' case to the effect that s. 18 of the Act allows the trustees with the consent of the governing body, if any, to sell the land or buildings of the institution, and that a power to sell includes a power to mortgage. The section has nothing to do with the

case, and is not addressed to anything done to raise money for a purpose like this. It is meant to apply to cases where it is deemed advisable to get rid of land which is not wanted. This is plain from the words of the section. In my opinion, therefore, the trustees have not power to borrow money for the purposes of building or enlarging the billiard-room. Then comes the question as to the power to borrow for the purpose of paying for necessary repairs of the building. That is a different matter. If there is anything in the building really requiring repair and the trustees expend money of their own in carrying the repairs out they will be entitled to a lien on the property of the institution for the money spent. The same result may be arrived at in another way—namely, under s. 19, under which they would get a charge in case they incurred expenses if called upon by the proper authority to make the repairs. The trustees doing the necessary repairs would be entitled to a charge for the moneys expended, and I do not see why they should not reimburse themselves if necessary by a mortgage of the premises of the institution. In my judgment they may mortgage to raise money for necessary repairs.

Solicitors for plaintiffs and assenting trustees: *Robbins, Billing & Co., for W. Waldron, Brierley Hill, Staffordshire.*

Solicitors for dissenting trustees: *Robinson & Bradley, for E. A. Sheldon, Stourbridge.*

F. E.

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Feb. 24; *March* 3, 4.

In re LONDON PRESSED HINGE COMPANY, LIMITED.

CAMPBELL *v.* LONDON PRESSED HINGE COMPANY, LIMITED.

[1905 L. 405.]

Company—Debenture—Floating Security—No Money payable on Debenture—Jeopardy—Receiver.

Debenture-holders, who have a floating security upon the undertaking and all the property, present and future, of a company, are entitled to the appointment of a receiver of the property subject to the debentures if their security is in jeopardy, although nothing is payable in respect of principal or interest, and there has been no default or breach of contract by the company.

THIS was a motion in a debenture-holder's action for the appointment of a receiver and manager of the undertaking and property comprised in the debentures.

The company was incorporated in May, 1903, and had issued debentures to the amount of 4000*l.* in forty debentures of 100*l.* each. The plaintiffs held fifteen of these debentures. By the debentures the company agreed to pay on May 19, 1908, to the registered holder for the time being the sum of 100*l.*, and in the meantime to pay interest at 5 per cent. per annum half-yearly on May 19 and November 19 in each year, and the company charged with such payments its undertaking and all its property, present and future.

By the conditions indorsed on the debentures it was provided: "(1.) This debenture is one of a series of forty debentures each for securing the principal sum of 100*l.* issued or about to be issued by the company. The debentures of the said series are all to rank pari passu as a first charge upon the property hereby charged without any preference or priority one over another, and such charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge in priority to the said debentures."

"(10.) The principal moneys hereby secured shall immediately became payable: (*a*) If the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the registered holder hereof before such interest is paid by notice in writing to the company calls in such principal money. (*b*) If an order is made or an effective resolution is passed for the winding-up of the company."

All interest on the debentures had been paid, including that due on November 19, 1904. On February 8, 1905, the Middlesborough Steel, &c., Company, Limited, issued a writ against the company to recover 109*l.* 18*s.* 8*d.* The company had no defence, and judgment was signed under Order XIV. on February 24, 1905.

The motion came before Buckley J. on February 24, 1905, when his Lordship appointed a receiver and manager for a week; ordered the motion to stand over for a week; and directed that notice should be given to the Middlesborough Steel, &c., Company, Limited, that they might appear and oppose the continuance of the appointment.

Buckmaster, K.C., and *A. J. Chitty*, for the plaintiff. A legal mortgagee is entitled to take possession of the mortgaged property; but an equitable mortgagee has no right to enter. He has not got the legal estate, so he cannot take possession. The Court takes possession for him by appointing a receiver. As between him and the equitable mortgagor the Court will appoint a receiver of the mortgaged property if the money is due or the security is in danger. We admit that the Court will not appoint a receiver simply because the mortgagor consents to it. A case must be made out and the Court must exercise its discretion before the order can be made.

A mortgagee can also obtain an injunction to restrain an outsider from injuring his security: *Legg* v. *Mathieson*. (1) The Court will take the whole of the property, including the equity of redemption, into its control: *Wildy* v. *Mid-Hants Ry. Co.* (2)

The position of a man who holds a floating charge is now

(1) (1860) 2 Giff. 71. (2) (1868) 16 W. R. 409.

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settled. His charge is over the whole of the property of the company.

[BUCKLEY J. The cases seem to me to produce injustice, but I cannot interfere with them. The law allows a company to mortgage all its property, present and future. So a debenture-holder can stand by and allow other people to advance money to the company, and can then come in and claim all the assets.]

The principle applies to individuals as well as to companies. Future book debts can be mortgaged: *Tailby* v. *Official Receiver*. (1) That no money was due is immaterial: *Davey & Co.* v. *Williamson & Sons*. (2) The principle is based on the fact that under the Companies Acts people can find out the position and rights of debenture-holders. The execution creditor threatens to issue execution; so we will amend the writ by adding him as a defendant, and asking for an injunction to restrain him from doing so.

F. Swann, for the company, did not oppose the motion.

Crossfield, for the judgment creditor. There is a distinction between specific and floating charges, and authorities on the one do not apply to the other. A floating charge was first defined in *In re Panama, New Zealand, and Australian Royal Mail Co.* (3), where it was said that a receiver would only be appointed where something was due on the security or the company was insolvent—that is, on the principle that to support the order there must be default by the company in some express or implied stipulation of the contract. A floating security allows the company to carry on its business until it makes default: *In re Florence Land and Public Works Co.* (4); *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (5) The Court will not appoint a receiver merely on the ground that the security is in jeopardy. In *Legg* v. *Mathieson* (6) the security was not really a floating charge. *Wildy* v. *Mid-Hants Ry. Co.* (7) is the strongest case against

(1) (1888) 13 App. Cas. 523.
(2) [1898] 2 Q. B. 194.
(3) (1870) L. R. 5 Ch. 318.
(4) (1878) 10 Ch. D. 530.
(5) [1897] A. C. 81.
(6) 2 Giff. 71.
(7) 16 W. R. 409.

us; but in that case also the security was specific, not floating. In *In re Standard Manufacturing Co.* (1) execution had been issued. In *McMahon* v. *North Kent Ironworks Co.* (2) the company was not carrying on business; therefore there was a breach of an implied term of the contract. In *Hubbuck* v. *Helms* (3), when the debenture-holders applied for a receiver the company was not a going concern and had attempted to sell its undertaking. In *Edwards* v. *Standard Rolling Stock Syndicate* (4) the company offered no opposition to the appointment of a receiver, and North J. merely followed *Wildy* v. *Mid-Hants Ry. Co.* (5) In *Thorn* v. *Nine Reefs, Ld.* (6), the company had ceased to carry on business. In *In re Victoria Steamboats, Ld.* (7), there was a breach of an express condition of the debentures. In *Davey & Co.* v. *Williamson & Sons* (8) the money had become payable and the security had crystallized. There is no case in which an ordinary equitable mortgagee has been held to be entitled to a receiver merely because his security is in jeopardy: Ashburner on Mortgages, p. 252. The practice of appointing receivers of property comprised in floating charges has grown up because the distinction between specific and floating charges has been ignored. A receiver will only be appointed of specific property. There is no case in which a debenture-holder has obtained priority where there has been no breach in the contract. Until default the charge floats, and does not attach to any specific property: *Taunton* v. *Sheriff of Warwickshire.* (9)

Buckmaster, K.C., in reply. A condition in a debenture that the company would pay no debts before paying off the debenture would be legal although it would paralyze the business. The result of the doctrine is unfortunate, but it is covered by authority. The consent of the company is not a fraudulent preference, for there is no voluntary payment by them. The appointment of a receiver is not confined to cases in which there has been a breach of contract. There had been

(1) [1891] 1 Ch. 627.
(2) [1891] 2 Ch. 148.
(3) (1887) 56 L. T. 232.
(4) [1893] 1 Ch. 574.
(5) 16 W. R. 409.
(6) (1892) 67 L. T. 93.
(7) [1897] 1 Ch. 158.
(8) [1898] 2 Q. B. 194.
(9) [1895] 1 Ch. 734.

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no default in *Davey & Co.* v. *Williamson & Sons* (1), and the very point was argued. The company have no right to oppose the application. They are entitled to carry on their business, but that does not include submitting to an execution.

Cur. adv. vult.

March 4. BUCKLEY J. This is a debenture-holder's action in which the plaintiffs are holders of debentures by way of floating security upon the undertaking and all property, present and future, of the company. Nothing is due and presently payable in respect of either principal or interest. The principal is payable on May 19, 1908, or, by virtue of the 10th condition (*a*) upon six calendar months' default in payment of interest; or, (*b*) if the company is wound up. Neither of these events has happened. The interest is payable in May and November. All interest has been paid down to and including November, 1904. In this state of facts the plaintiffs move for a receiver, on the ground that their security is in jeopardy. The jeopardy consists in the fact that a creditor has issued a writ and signed judgment and is in a position to issue execution. Under these circumstances the plaintiffs, to whom nothing is presently payable, ask for a receiver, the effect of whose appointment will be that the company can no longer pay the creditor, to whom payment is presently due, in priority to the debenture-holder, to whom nothing is presently due. The company, as is commonly the case, appear, and consent to the order. Why, indeed, under the circumstances, should they oppose?

These applications are becoming so frequent that I have taken the opportunity to look into the cases, in order to see whether, as the authorities stand, it is possible to prevent the injustice which is now of frequent occurrence, and which I will describe. I directed the motion to stand over last week, and notice to be given to the judgment creditor, hoping that he would come in and argue the point. That hope has been realized. I have had the advantage of an argument from Mr. Crossfield, which is none the less valuable because I find myself unable to accede to it.

(1) [1898] 2 Q. B. 194.

The cases are numerous in which the undertaking of a limited company is so loaded with debentures that the profits are barely sufficient, or perhaps not sufficient, to keep down the debenture interest, and that, if the company is wound up, there is nothing for any one but the debenture-holders. In short, the facts often are that the undertaking is substantially carried on only for the benefit of the debenture-holders who have a floating security over it. In this state of facts money is lent or goods consigned to the company in respect of which a debt accrues to a creditor, and so long as the security floats, as it is termed, and no receiver is appointed, the creditor has a possibility or expectation of being paid by the company, for, as between the company and the debenture-holders, the former may pay in the ordinary course of business. But directly a receiver is appointed, this expectation of the creditor is intercepted. He may have lent his money, or consigned his goods, to the company last week; but if he has the audacity to ask payment and to enforce his legal remedies to obtain it, the debenture-holder obtains a receiver in a proceeding to which the execution creditor is not a party, and thus closes the door against him, taking his money or his goods as part of the security, and leaving the creditor who supplied the money or the goods to go unpaid. I regret to be driven to the conclusion that, as the law stands, those are the rights of the debenture-holder entitled to a floating charge.

It was decided in the Appeal Court in *In re Standard Manufacturing Co.* (1) that an execution creditor takes subject to all equities, and that the sheriff cannot by seizing get rid of the rights of debenture-holders to which the property was subject when in the hands of the debtor company. The Court of Appeal in *In re Opera, Ld.* (2), stated that the decision in *In re Standard Manufacturing Co.* (1) was a clear decision that the execution creditor takes subject to the equity of the debenture-holders. From this decision it has resulted that in interpleader, that is to say, even in the case when no receiver has been appointed, the execution creditor can have no more than the benefit of the equity of redemption, and that the rights of the debenture-holders prevail over his rights: *Davey*

(1) [1891] 1 Ch. 627. (2) [1891] 3 Ch. 260.

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& Co. v. *Williamson & Sons* (1); *Simultaneous Colour Printing Syndicate* v. *Foweraker* (2); *Duck* v. *Tower Galvanizing Co.* (3) This being the law, the fact is that the appointment of a receiver does not, as between the execution creditor and the debenture-holder, disappoint the execution creditor of anything which otherwise would be his right. For from those authorities it results that the creditor never had any right as between himself and the debenture-holder to enforce payment in priority to the debenture-holder. If he availed himself of his legal right to judgment and execution the debenture-holder could intercept his execution. In fact the unfortunate creditor had no right enforceable by legal process in cases where the equity of redemption was of no value, notwithstanding the fact that his money or his goods had gone to increase the property included in the security. His right to look for payment from the company rested only upon the expectation that the debenture-holder would not put an end to the company's authority to pay the creditor in the ordinary course of business. The authorities seem to me to involve that the creditor has no right to complain because steps are taken to put an end to the authority thus given by the debenture-holders to their mortgagor.

The appointment of a receiver at the instance of an equitable incumbrancer, at any rate where nothing is presently payable to him, is no doubt matter of discretion: *Thorn* v. *Nine Reefs, Ld.* (4) But if the execution creditor's rights are not affected except as above stated by the appointment of a receiver, there exist, so far as I see, no grounds why the Court should exercise its discretion against the appointment of a receiver by reason of any considerations arising as between the execution creditor and the debenture-holder. The only relevant consideration would seem to be whether, as between the company and the debenture-holder, it is just and convenient that the company's authority to dispose of its assets in the ordinary course of business should be stopped. As between those parties it would seem reasonable that the authority should be stopped if its continuance would injure the debenture-

(1) [1898] 2 Q. B. 194.
(2) [1901] 1 K. B. 771.
(3) [1901] 2 K. B. 314.
(4) 67 L. T. 93.

holder. A legal mortgagee may take possession simply because he chooses. In so doing he accepts the responsibility of a mortgagee in possession. An equitable mortgagee must shew good reason why the Court should at his instance take possession by its receiver. Lord Chelmsford in *Wildy* v. *Mid-Hants Ry. Co.* (1) held that danger to the security by anticipated acts of an execution creditor is good reason. Jeopardy of the security thus becomes relevant. The mere fact of consent by the mortgagor would not be enough. This probably explains the fact that in both the more recent cases in which a receiver has been appointed on the ground of jeopardy—*McMahon* v. *North Kent Ironworks Co.* (2); *Edwards* v. *Standard Rolling Stock Syndicate* (3)—the question of jeopardy was treated as material, although the company appeared and consented. But for this consideration, the fact that jeopardy was treated as material might be thought to tend to some extent in the direction in which I desire to find authority; but the implication, even if it exists, seems to me inconsistent with the express decisions. I am unable upon the authorities to find anything to enable me to put a stop to what I feel to be an injustice. It is an injustice arising from the nature as defined by the authorities of a floating security. The mischief arises from the fact that the law allows a charge upon all future property. The subject, however, is one which, I think, urgently requires attention. I should be glad that the authorities should be reviewed in a Court of higher jurisdiction than this in case the execution creditor should be able to find grounds for thinking that the decisions which bind me can be successfully impeached elsewhere. It is not for me to say whether the matter requires the attention of the Legislature. In my judgment the plaintiffs, as the authorities stand, are entitled to an order for a receiver, and I make an order accordingly. The costs will be costs in the action.

Solicitors: *Ward, Perks & McKay; A. R. Gillman, for Lucas, Hutchinson & Meek, Middlesborough.*

(1) 16 W. R. 409. (2) [1891] 2 Ch. 148.
(3) [1893] 1 Ch. 574.

H. C. R.

BUCKLEY J.

1905

March 16.

In re GRASSI.
STUBBERFIELD *v.* GRASSI.

[1903 G. 839.]

Will—British Subject's Holograph Will in accordance with Law of Foreign Country in which made—Effect on English Leaseholds—Lord Kingsdown's Act (*Wills Act*, 1861) (24 & 25 *Vict. c.* 114), *ss.* 1, 4.

Sect. 1 of Lord Kingsdown's Act provides that every will made out of the United Kingdom by a British subject (whatever may be his domicil) "shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate" if made according to the forms required by the law of the place where the same was made:—

Held, that "personal estate" includes leaseholds, and that when the will of a British subject made abroad in the form required by the law of the place has been proved in England, the beneficial interest in the leaseholds passes to the person pointed out in the will as the donee of that interest, provided the bequest does not infringe the law of England, e.g., that relating to accumulations or perpetuity.

Carlo Grassi was domiciled in England and was a naturalized British subject. He owned leasehold property in Gerrard Street, Soho, and Little Pulteney Street, London. On December 22, 1901, while on a visit to Italy, he died at Viadana, in that country, having while in Italy made a holograph will which was not attested by any witnesses. The will was in the Italian language and, as translated into English, was as follows:—

"Parma, the first of November, 1901. By means of this my holograph will, I dispose of my property for the time when I shall have ceased to live in the following manner: I bequeath the usufruct for life of all my property to my dearest wife Louisa Frances Cook [*sic*] wherever the said property may be situate and existing. [Here followed some pecuniary legacies.] I grant in favour of my sister Luigia Grassi, widow of Tizzi, a life annuity of 400 Italian lire, to be paid quarterly in advance from the day of my death and by the care and at the charge of my wife, the usufructuary, and in the event of the predecease of the latter I charge the heirs, whom I am about to appoint,

therewith. The legacies to my nephew and niece . . . . and to the sister Maria Grassi shall be paid within two years from my death, without opposition from my wife, who must renounce the usufruct of the corresponding capital. I exempt my said wife from the obligation of making an inventory and of giving security. I nominate and appoint as my universal heirs to the bare ownership of my property the Congregation of Charity of Viadana, in order that, upon the death of my wife, the usufructuary, an institution may be founded as an asylum for poor abandoned old people of both sexes, to be called by my name and that of my wife, that is to say, 'The Carlo and Louisa Grassi Institution.' I appoint as testamentary executor Socrate Zangelini . . . . Francesco Grassi . . . . and J. W. Stubberfield . . . . (Signed) Carlo Omobono Grassi, son of the late Domenico."

This will was valid according to Italian law, and in February, 1902, it was proved in England by Stubberfield, power being reserved to make a like grant of probate to the other executors.

Double probate of the will was afterwards granted to Zangelini.

An action was commenced in the Chancery Division by Stubberfield against Louisa Frances Grassi (the widow of the testator), Socrate Zangelini, the Congregation of Charity of Viadana, and Luigia Grassi (representing the testator's next of kin) for administration of the real and personal estate of the testator. And in this action an order was made directing certain inquiries, including an inquiry as to the technical meaning of "usufruct" in Italian law.

In answer to this inquiry the master certified as follows:—

"The word 'usufruct' has a technical meaning according to the Italian law, and as appears by the . . . . affidavit of . . . . Carlo Fadda (a member of the Italian Bar) the following definition is given of the term by art. 477 of the Italian Civil Code: 'Usufruct is the right to enjoy things the ownership (proprietà) of which belongs to another in the manner in which the owner (proprietario) would enjoy the same, but with the obligation to preserve the substance of them as regards both the matter and the form thereof.' Every species of property

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movable and immovable may be the subject of a 'usufruct.' The legal effect according to the Italian law of the gift in the testator's will contained, 'I bequeath the usufruct for life of all my property to my dearest wife Louisa Frances Cook, wherever the said property may be situate and existing,' is to give a specific legacy to the said defendant Louisa Frances Grassi of the usufruct for her life of all the property the testator was possessed of or entitled to at the time of his death, and it entitles her, according to such Italian law, to the possession and enjoyment of the same from the day of the testator's death, subject to the duties and liabilities imposed on usufructuaries by the provisions of arts. 477 and 496 to 514 of the Italian Civil Code . . . . (save in so far as the said duties or liabilities are modified or excluded by the following clause contained in the said will: 'I exonerate my said wife from the obligation to make an inventory and to give security'), and subject to payment of his debts and to the legacies and to the annuity given by his will. The above-mentioned gift according to Italian law included the usufruct of the testator's business of a wine and provision merchant carried on by him at 26, Gerrard Street, Soho, and the enjoyment and right to receive the profits thereof having regard to the exemption of his said wife from the obligation of making an inventory and of giving security, and the nomination and appointment of the defendants, the Congregation of Charity of Viadana, as his universal heirs, and the other provisions in his said will declared."

A summons was taken out in the action by the plaintiff asking that directions might be given with reference to the leaseholds forming part of the testator's estate, and in particular whether, having regard to the provisions of Lord Kingsdown's Act (1), the beneficial interest therein was dis-

(1) 24 & 25 Vict. c. 114, s. 1: "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled

posed of by the will, and, if so, whether Louisa Frances Grassi was entitled to the specific enjoyment thereof during her life or for any other and what period during the continuance of the lease under which the testator held the premises.

This summons was adjourned into Court.

H. B. Cohen (*T. Boston Bruce* with him), for the plaintiff, stated the facts and submitted the question for the decision of the Court.

Birrell, K.C., and *A. J. Chitty*, for the testator's widow. By s. 1 of Lord Kingsdown's Act the will is good, as regards the personal estate, for the purpose of being admitted to probate. "Personal estate" must include leaseholds, and the beneficial interest in the leaseholds should be held to pass in the manner in which the testator has shewn by his will that he meant it to pass.

It is true that if the will had contained some provision in accordance with Italian law, but infringing some provision of English law, the statute would not have validated the illegal provision: *Freke* v. *Lord Carbery*. (1) But the difficulty in such a case arises from the conflict of laws with regard to immovable property. But the division into immovables and movables "does not square with the distinction known to English lawyers between things real, or real property, and things personal, or personal property": Dicey's Conflict of

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when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin."

Sect. 2: "Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made."

Sect. 4: "Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act."

(1) (1873) L. R. 16 Eq. 461.

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Laws, p. 72. The statute is referring to personal estate, not to movables.

In Foote's Private International Jurisprudence, 3rd ed. p. 268, note (*b*), the opinion is expressed that in cases within Lord Kingsdown's Act the lex situs with respect to leaseholds may be satisfied without the formalities required for the devise of English land by the Wills Act.

To hold that those formalities were requisite in the case of leaseholds would be to put a forced construction on the Act, for prior to the Wills Act those formalities were not required in the case of leaseholds.

Technical persons will no doubt say that the Act was only intended to enable wills to be admitted to probate, and that, although the legal title in the leasehold vests in the executor, the beneficial interest does not go to the intended donee pointed out in the will; but that is not the effect of the Act.

The Act is intituled "An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects." That law, so far as regards the formalities of execution, is contained in the Wills Act, 1837, s. 1 of which says that "'personal estate' shall extend to leasehold estates and other chattels real." Sect. 9 of that Act prescribes the formalities required for the due execution of wills, whether of realty or personalty. Sect. 11 excepts the cases of testators who are soldiers in actual military service or mariners at sea. The object of s. 1 of Lord Kingsdown's Act in saying that the will is to be "well executed for the purpose of being admitted to probate" is only to place such a restriction or limitation on the enabling words as are necessary to prevent its being said that the will is to be valid for all purposes—e.g., to render valid things which in other wills would contravene Thellusson's Act or the law against perpetuities.

If a will under circumstances like these is not good as to the beneficial interest in leaseholds, it is not good as to a similar interest in any personal estate in England. As regards the old law, the case of *Stanley* v. *Bernes* (1) may be referred to. There a natural-born British subject, resident and naturalized

(1) (1830) 3 Hagg. Ecc. 373.

in Portuguese dominions, made a will and two codicils disposing of effects partly in Portugal and partly in England, executed according to Portuguese law, but inferring that he considered himself an Englishman. These instruments were admitted to probate in England by the High Court of Delegates, but two further codicils disposing solely of money in the British funds, attested by three witnesses, but not executed according to the law of Portugal, were refused probate.

Under s. 2 of the Act it has been held that, where an Englishman resident in Scotland bequeathed his whole means and effects by a will executed according to the law of Scotland, but not to that of England, leasehold estates in England passed: *In re Watson.* (1)

[They also referred to s. 26 of the Wills Act, 1837, and to *Davis* v. *Gibbs.* (2)]

F. Whinney, for the Congregation of Charity of Viadana. The Act of 1861 uses the term "personal estate" as a technical term, which is defined in the Wills Act, 1837. The words of restriction in s. 1 of the Act of 1861 may have been inserted to prevent a conflict with the probate laws of some other country: see *Hood* v. *Lord Barrington.* (3) Notwithstanding s. 26 of the Wills Act, 1837, it has been said that a gift of real estate does not pass leaseholds: *Butler* v. *Butler.* (4)

The term "personal estate" cannot have different meanings in ss. 1 and 2 of the Act of 1861.

Buckmaster, K.C., and *Sheldon*, for Luigia Grassi. The beneficial interest in the leaseholds did not pass to the widow, but belongs to the next of kin. Some effect must be given to the words "for the purpose of being admitted to probate." They are satisfied by holding that on probate being obtained here the executor obtains the legal title in all the personal estate; and that no beneficial interest in any personalty passes to the persons named as beneficial legatees in the will. There is nothing absurd in such a construction, having regard to *Pepin* v. *Bruyère.* (5)

(1) [1887] W. N. 142; 35 W. R. 711.
(2) (1729) 3 P. Wms. 26.
(3) (1868) L. R. 6 Eq. 218.
(4) (1884) 28 Ch. D. 66.
(5) [1902] 1 Ch. 24.

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Assuming that the beneficial interest in personal estate other than leaseholds passes, it is contended that the beneficial interest in leaseholds does not pass to the legatee.

The Act does not profess to amend the Wills Act. The fact that a disposition is admitted to probate here does not render it valid as an exercise of a power of appointment by will if it is not executed in accordance with s. 9 of the Wills Act, 1837.

[They also referred to *In re Kirwan's Trusts* (1); *Pechell* v. *Hilderley* (2); Jarman on Wills, 4th ed. vol i. p. 8.]

No reply was called for.

BUCKLEY J. The question to be decided is whether the words "personal estate" in s. 1 of Lord Kingsdown's Act include leaseholds. The division of subjects of property into movables and immovables and into real estate and personal estate are familiar to all of us. They are not coterminous. Leaseholds are immovables, but are nevertheless personal estate although they savour of the realty. A door is thus opened to controversy whether the words "personal estate" in Lord Kingsdown's Act are confined to movables. When the Wills Act was passed in 1837, care was taken to define personal estate, and in s. 1 it was provided that the words "personal estate" should extend to leasehold estates and other chattels real. Sect. 11 of the same Act provides that "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." It cannot be disputed that the words "personal estate," as there used, include any leasehold property which the soldier or mariner may possess. Sect. 26 of the Wills Act provides that a general devise of a testator's lands shall include leasehold estates. The Act throughout proceeds on the footing that leasehold property is not real estate but personal estate, so that s. 26 was wanted to include leaseholds under "lands." All the sections tend to shew that the Wills Act proceeds, not on the division between mobilia and immobilia, but on that

(1) (1883) 25 Ch. D. 373. (2) (1869) L. R. 1 P. & M. 673.

between real and personal estate; and that was the distinction recognised when Lord Kingsdown's Act was passed.

Lord Kingsdown's Act was passed in 1861 and is intituled, "An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects." That title does not, it is true, refer to the Wills Act; but the law which Lord Kingsdown's Act was going to amend was, in fact, contained in the Wills Act, 1837. The Wills Act required wills to be executed and attested in the manner there pointed out. Lord Kingsdown's Act was going to affect that law and to say that in certain cases wills should be admitted to probate although that Act had not been complied with.

The 1st section of Lord Kingsdown's Act relates to wills made out of the United Kingdom by British subjects. The 2nd section relates to wills made in the United Kingdom by British subjects. The framework of the two sections is substantially the same, but there are certain verbal differences between the two sections, which may, and I think must, have arisen from a want of scanning the language, and not from the existence of any purpose of producing different results. For instance, s. 1 refers to "a British subject," whereas s. 2 speaks of "any British subject." Sect. 1 refers to "the law of the place"; s. 2 refers to "the laws for the time being in force in that part of the United Kingdom where the same is made." Again, there is a difference of language in the words pertinent to the matter which I have to decide, inasmuch as s. 1 says that the will shall, as regards personal estate, "be held to be well executed for the purpose of being admitted . . . . to probate," whereas s. 2 says that the will "shall, as regards personal estate, be held to be well executed and shall be admitted . . . . to probate." Does s. 1 mean that the will is to be well executed for the purpose only of being admitted to probate, and not for any other purpose? I cannot understand how that can possibly be held to be the meaning. The variance between the two sections is, in my judgment, one of words only, and not of meaning. What is the effect of being "well executed for the purpose of being admitted to probate"? Does that extend to make a gift of leasehold property to a certain person

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effectual? I cannot see why it should not. In the Act which is amended personal estate is defined as including leaseholds. Again, s. 4 of Lord Kingsdown's Act says that nothing in that Act contained shall invalidate any will, "as regards personal estate," which would have been valid if that Act had not been passed, except as such will may be revoked or altered by any subsequent will made valid by the Act. The personal estate there referred to must be the same thing as that referred to in s. 1 and that referred to in s. 11 of the Wills Act. I see no reason whatever why the expression "personal estate" as used in Lord Kingsdown's Act should not be held to include leasehold property.

There is another reason which appears to me to support the conclusion at which I arrive. Before Lord Kingsdown's Act, where a British subject domiciled abroad made a will according to the law of his domicil and that will was admitted to probate here, although the legal title in any leaseholds given by the will passed, the will would not pass the beneficial interest in the leaseholds. Mr. Buckmaster argued that nothing was done by Lord Kingsdown's Act to help such a person wishing to dispose of his beneficial interest. But it seems to me that the Act has done something for the testator in such a case by giving him the means of disposing of the beneficial interest in the lease. I need not refer to the cases cited, which are only authorities for familiar propositions. A disposition by will to which Lord Kingsdown's Act applies is no doubt not effectual in any way other than that which results from its being admitted to probate; for example, although it might be admitted to probate it is clear, on the authority of *Freke* v. *Lord Carbery* (1), that provisions in a will infringing Thellusson's Act or the English law against perpetuities would not be validated by Lord Kingsdown's Act. Therefore s. 1 of that Act does not say that the will shall be valid for all purposes. The section says, in effect, that the will shall be valid for the purposes of being admitted to probate, and will then take its place and be effectual for such purposes following on probate as the law of England allows.

(1) L. R. 16 Eq. 461.

This testator was an Italian by origin, but at the time of his death he was naturalized and domiciled in this country, and for all purposes material to this case was an Englishman. He went on a visit to Italy and died there, and his case clearly falls within s. 1 of the Act of 1861. The will was made out of the United Kingdom by a British subject and was valid according to the law of Italy, and has been admitted to probate in England. By his will he left the usufruct in his property in the manner indicated therein. The effect is that his widow is entitled to a life interest in his leaseholds, and it is not disputed that she has the right to enjoy them in specie.

Solicitor for plaintiff and the widow: *Herbert F. Oddy.*

Solicitors for the Congregation of Charity: *Markby, Stewart & Co.*

Solicitor for Luigia Grassi: *T. Richards.*

F. E.

PAWLEY *v.* PAWLEY.

[1903 P. 2622.]

Husband and Wife—Married Woman Plaintiff—Dismissal of Action with Costs—Order for Payment out of separate Property notwithstanding Restraint on Anticipation—Receiver—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

In an action by a married woman, on an application for an order, under s. 2 of the Married Women's Property Act, 1893, for payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, the onus is on the married woman to shew why the order should not be made.

In November, 1903, this action was commenced in the King's Bench Division by or in the names of C. J. C. Pawley, Hamilton E. Pawley, Emily De Hoog (a married woman), and Lucy Dresel (a married woman) against Ernest Frederick Pawley, the claim being for damages for an alleged breach of an agreement. The name of Emily De Hoog was struck out by an order dated April 21, 1904.

On June 1, 1904, the action was transferred to the Chancery

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Division, and on December 9, 1904, an order was made that the action should be dismissed with costs, such costs to be taxed by the taxing master and paid by the plaintiffs C. J. C. Pawley, H. E. Pawley, and Lucy Dresel to the defendant, as to the plaintiff Lucy Dresel out of her separate property as thereinafter mentioned, and not otherwise. And it was thereby ordered that execution therein against the plaintiff Lucy Dresel be limited to the separate property of the said plaintiff not subject to any restraint against anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, such property should be liable to execution notwithstanding such restraint. And it was ordered that the defendant be at liberty to apply as to enforcing payment of the said costs, as regards the plaintiff Lucy Dresel, when taxed out of any of her property which was subject to restraint on anticipation and otherwise as the defendant might be advised.

The costs were taxed and certified at the sum of 125*l.* 11*s.* 6*d.*, and the defendant was unable to obtain payment of the same.

Under the will of one C. Pawley, deceased, Lucy Dresel was entitled to the income of a share of the residue of the testator's estate during her life for her separate use without power of anticipation, and the trustees of the will (one of whom was the defendant) had in their hands about 200*l.* of income accrued due in respect of Lucy Dresel's share.

The defendant moved, on notice of motion to Lucy Dresel, for the following order: "1. That the defendant's costs of this application may be taxed by the taxing master, and that the defendant may be at liberty, notwithstanding the restraint upon anticipation imposed by the will . . . . upon the income payable thereunder to the plaintiff Lucy Dresel, to apply all or any part of the said income accrued or as it accrues due which comes into his hands as a trustee under the said will and which under the said will and a deed of family arrangement . . . . is payable to her, in payment (1.) of the sum of 125*l.* 11*s.* 6*d.* and interest the amount of the defendant's costs of this action directed to be taxed under the order herein dated December 9, 1904, and (2.) of the defendant's costs of this application when taxed as aforesaid.

"2. That if necessary the defendant may be appointed receiver of the said income of the said plaintiff up to the value of 125*l.* 11*s.* 6*d.* and the amount of the defendant's taxed costs of this application.

"3. Or that such further or other order may be made in the premises as to this Honourable Court may seem meet."

Cozens-Hardy, for the defendant. The application is not made under s. 39 of the Conveyancing and Law of Property Act, 1881. By s. 2 of the Married Women's Property Act, 1893, in any action instituted by a married woman the Court before which the action is pending has jurisdiction to order payment of the costs of the opposite party "out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

The jurisdiction has been exercised in many cases, including *In re Godfrey*. (1) In *Cummins* v. *Perkins* (2) a receiver was appointed of the separate property where the married woman's action had been dismissed with costs, to be paid out of her separate property but not otherwise. The forms of the orders made in these cases are set out in Seton on Judgments, 6th ed. vol. ii. pp. 886, 887; and see Annual Practice, 1905, vol. ii. pp. 365, 366.

[BUCKLEY J. What is the principle to be acted on? Is an order for a receiver made as a matter of course where there is a restraint on anticipation?]

No principle seems to have been laid down, the question considered being whether the Act of 1893 applied: *Hood Barrs* v. *Cathcart* (3); *Crickitt* v. *Crickitt*. (4) The former case shews, however, that where the proceeding has simply been dismissed with costs a receiver may, by a subsequent order, be appointed in respect of property on which there is a restraint against anticipation.

[BUCKLEY J. If the order is a matter of course, a married woman may by a passion for litigation fritter away

(1) (1895) 72 L. T. 8.
(2) [1899] 1 Ch. 16.
(3) [1895] 1 Q. B. 873.
(4) [1902] P. 177.

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all the property which she was meant to be restrained from anticipating.]

The onus at any rate lies on a married woman who has been defeated in an action to shew why the costs ought not to be made payable out of property in respect of which there is a restraint.

Lucy Dresel, in person, said she had been joined as a plaintiff without her consent, and had told the solicitor who acted in the matter that she disclaimed all responsibility.

BUCKLEY J. On December 9, 1904, the trial took place of an action in which one of the plaintiffs was Lucy Dresel, a married woman, and the action was dismissed with costs to be paid by the plaintiffs, and liberty was given to the defendant to apply as to enforcing payment of the costs as against Lucy Dresel out of any of her property which was subject to restraint on anticipation. The costs were taxed at 125*l.* 11*s.* 6*d.*, and under s. 2 of the Married Women's Property Act, 1893, an application is now made to enforce payment of these costs out of her separate property subject to restraint on anticipation. No principle is laid down in the reported cases for the guidance of the Court as to how these applications ought to be dealt with. If the Court, merely because the married woman has brought an action and failed and been condemned in costs, is to remove the restraint on anticipation in order that the successful defendant may obtain payment of costs, any married woman can fritter away everything she has by becoming a professional litigant. It seems to me that it is not a matter of course to make an order for payment of costs out of separate property subject to the restraint. In the present case the judgment left it open to the defendant to apply for such an order. No grounds have been shewn for or against the removal of the restraint other than the fact that the married woman has been ordered to pay costs. Primâ facie the person who has obtained an order for costs against another person is entitled to have his costs paid. The onus, I think, is on the married woman ordered to pay costs to shew that the doctrine of restraint on anticipation ought to be applied or sustained in her favour, and to the

prejudice of the person who has obtained an order for payment of costs. In the present case the married woman does not sustain that onus. She has handed in an affidavit to the effect that the proceedings were taken without her consent. That is not material. The order on her to pay costs is binding on me. It may or may not be that she has some ground for complaint against the solicitor who commenced proceedings in her name; it is not for me to say whether she has any claim against him. I make the order asked for on the present application.

Cozens-Hardy. As the applicant is only one of several trustees, it will be better to take the order appointing him receiver without remuneration and without security on the lines of the form numbered 6 in Seton on Judgments at p. 887.

Solicitors for applicant: *Sandom, Kersey & Knight.*

F. E.

In re WEST COAST GOLD FIELDS, LIMITED.

ROWE'S TRUSTEE'S CLAIM.

[0047 of 1905.]

Company—Shares—Bankruptcy of Shareholder—Proof in Bankruptcy for Liability in respect of future Calls—Effect as to paying Shares up—Winding-up—Surplus Assets.

Where the holder of shares in a company not fully paid is adjudicated a bankrupt, and the company proves in the bankruptcy for the estimated value of the liability to future calls on the shares and receives a dividend less than 20*s.* in the pound on the amount of the proof, the shares do not thereby become fully paid shares.

If the company is subsequently wound up, and after satisfying all its liabilities there remain assets for distribution among its shareholders, the bankrupt's estate is not entitled to benefit by the distribution as owning fully paid shares until it has paid to the liquidator the total amount remaining unpaid on the shares after receipt of the dividend from the bankrupt's estate.

The principle of *Grissell's Case*, (1866) L. R. 1 Ch. 528, applied.

THE West Coast Gold Fields, Limited, was incorporated in 1901, with a nominal capital divided into shares of 1*l.* each.

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Anthony Stanley Rowe was the registered owner of some fully paid shares in the company, and also of 1800 shares, on which only 10*s.* per share had been paid up.

Clause 21 of the articles of association of the company provided that the company should have a first and paramount lien on all shares not fully paid up for all moneys due to (including calls made, even though the time appointed for their payment might not have arrived) and liabilities subsisting with the company from or on the part of any registered holder.

On January 8, 1903, the company made a call of 1*s.* per share on the 1800 shares.

On January 19, 1903, a receiving order was made against Rowe, and on January 22, 1903, he was adjudicated a bankrupt.

On January 26 the company lodged a proof against Rowe's estate for 900*l.*, being as to 90*l.* in respect of the call of 1*s.* on 1800 shares, and as to 810*l.* in respect of the balance of 9*s.* per share uncalled on those shares. The company did not in the proof value its lien on the shares.

The trustee in Rowe's bankruptcy rejected the proof, but on appeal it was directed to be admitted for 819*l.*, being as to 90*l.* for the call of 1*s.* per share, and as to 729*l.* for the uncalled 810*l.* less a discount of 10 per cent. on the 810*l.*

In January, 1904, the trustee declared a dividend of 1*s.* 6*d.* in the pound, which was received by the company in respect of its admitted proof. The debtor's estate was estimated to realize about another 1*s.* 6*d.* in the pound: see *In re Rowe, Ex parte West Coast Gold Fields, Ld.* (1)

In April, 1904, the company went into voluntary winding-up, and after satisfying all the company's debts and liabilities there would be surplus assets in the hands of the liquidator, for distribution among the shareholders, estimated to be sufficient to pay 3*s.* per share on all the fully paid shares in the company.

The trustee in bankruptcy took out an originating summons in the winding-up, under s. 138 of the Companies Act, 1862, asking that the 1800 shares ought, for the purpose of any dis-

(1) [1904] 2 K. B. 489.

tribution of the assets of the company among its contributories, to be treated as fully paid shares.

Felix Cassel, for the applicant. The effect of proving for the whole amount called and uncalled on the shares, and abandoning the lien, and receiving a dividend, is that the shares are now fully paid.

The point has never been decided, although it came before Stirling J. in *In re McMahon*. (1) It was there held that a company, although not in winding-up, could prove, in the administration of the insolvent estate of a deceased shareholder, for the estimated value or the liability to future calls on his shares; and this decision proceeded on the assumption that proof in bankruptcy was equivalent to payment. (2)

[BUCKLEY J. In *Grissell's Case* (3) it was held that even where the shareholder was a creditor of the company, he could not in winding-up set off the debt due to him, or a dividend coming to him, against calls. Why should a shareholder be in a better position because he has been made a bankrupt? The bankrupt's estate has not paid up the shares until 20*s*. in the pound has been paid on them.]

Actual payment in cash, or even satisfaction of the full amount of the nominal value of a share, is not essential to make it fully paid, e.g., as Stirling J. pointed out in *In re McMahon* (1), a share may be treated as fully paid because the company is estopped from denying that fact. The original debt or liability on the share is gone, as the proof operated as payment or satisfaction of it: *Stammers* v. *Elliott* (4); *Ex parte Solomon* (5); *Ex parte Hornby*. (6) The company cannot complain if the result is that the shares are held to be fully paid, for it might have obtained a disclaimer of the shares or rescission of the contract with the shareholder by proceedings under s. 55 of the Bankruptcy Act, 1883. [He also referred to *Ex parte West Riding Union Banking Co.* (7)]

(1) [1900] 1 Ch. 173.
(2) Ibid. 177.
(3) L. R. 1 Ch. 528.
(4) (1868) L. R. 3 Ch. 195.
(5) (1821) 1 G. & J. 25.
(6) (1819) Buck, 351
(7) (1881) 19 Ch. D. 105.

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Astbury, K.C., and *P. M. Walters*, for the liquidator. It is admitted that the debt of the company is extinguished; that Rowe cannot be sued for any calls; and that the company has abandoned its lien. Those facts, however, do not make the shares fully paid. The point before the Court was not decided in *In re McMahon* (1), and there is no authority directly in point.

The principle of *Grissell's Case* (2) ought to be applied.

When the Court distributes surplus assets amongst shareholders of a company, it acts on the principle of returning to them the sums they have actually paid in respect of capital, and if some of them have paid more than others, the difference is first paid to the former, and when by this means all are placed on a level, distribution takes place pari passu. The applicant here wants a different mode of distribution to be followed, which would not be fair to the shareholders who have really paid for their shares in full.

Cassel, in reply.

BUCKLEY J. In *Grissell's Case* (2) it was decided, many years ago, that where a person is both a creditor of and a shareholder in a company, his shares being partly paid up, he must satisfy all his obligations as a shareholder and contributory, by paying into the common fund all sums due from him in respect of calls, before he can say, "As a creditor I am entitled to take something out of the common fund." There can be no set-off; the man must pay in before he can be heard to say that he can take out.

Now the case with which I have to deal is not that of a creditor who also holds shares, but is simply that of a person who is a shareholder, and a shareholder only, and all that he is entitled to receive from the company is receivable, not in respect of a debt, but in respect of a distributive share of the assets of the company in liquidation. I am asked to say that he is entitled to receive something out on distribution of assets of the company amongst its shareholders before he has discharged himself of his obligation to pay in. The case is much stronger,

(1) [1900] 1 Ch. 173. (2) L. R. 1 Ch. 528.

as it seems to me, against the applicant than was *Grissell's Case*. (1)

It is said that these are his rights because he is a bankrupt. The material dates are these. He was adjudicated bankrupt in 1903, being the holder of shares on which 10*s*. per share had been paid, 1*s*. had been called, and 9*s*. was uncalled. In October, 1903, proof was admitted in the bankruptcy against the bankrupt's estate for the sum of 819*l*., being 90*l*. for the 1*s*. per share on the 1800 shares which had been called, and 729*l*. for the uncalled liability less a discount of 10 per cent. Subsequently the company went into liquidation. What was the position of things at that time? The bankrupt's estate was entitled to the shares; they formed part of the estate in bankruptcy, and they belonged to the trustee as trustee. The bankrupt's estate was liable for a sum of 819*l*., and the trustee was liable for that as trustee. In point of fact, upon the proof he has paid 61*l*. 8*s*. 6*d*. for a dividend on the amount of the proof, so that these 1800 shares have had paid on them 900*l*.—namely, 10*s*. a share—and 61*l*. 8*s*. 6*d*., making together 961*l*. 8*s*. 6*d*.

The trustee says that he ought to receive in distribution the same amount as if there had been paid 1800*l*. on the shares. Is that right or is it wrong? In my judgment it is wrong. The argument is that proof is equivalent to payment. To my mind that is an axiomatic or epigrammatic way of stating something which, in the circumstances, is quite untrue for the material purposes of this case. Of course, proof is equivalent to payment in this sense, that the debtor can be pressed no further than for that amount; he is discharged, but his estate is not discharged. The proof is the record of the fact that his estate is liable, and that from his estate you are entitled to receive, rateably with the other creditors, dividends until the whole amount has been paid. That is not payment at all for any purpose which is material here.

The cardinal fact is that the amount proved for is not paid. What will be the rights of the company in the future? In

(1) L. R. 1 Ch. 528.

BUCKLEY J. 1905 ROWE'S TRUSTEE'S CLAIM.

respect of this proof, if there are further assets of the bankrupt —and only if there are further assets—there will be a right to receive back part of these moneys. Now what is the right mode of administration under these circumstances? Why does *Grissell's Case* (1) not apply? I do not want to use any terms that are misleading, but I shall not be misunderstood if I say that the trustee is the owner of the shares, and the trustee is the person who is liable to pay upon these shares. It is said that the principle of *Grissell's Case* (1) does not apply to such a state of things as this. It seems to me that it does apply, and a fortiori when, as here, the trustee is seeking to get distribution as a contributory when he has not complied with his liability to pay as a contributory. Another ground on which Mr. Astbury puts it, and which I think is also worthy of consideration, is this—that what you do in distribution of surplus assets is in substance to repay that which has been paid; that you are returning to the shareholders that which they have paid, and that where one man has paid more than another, the first thing you do is to repay the man who has paid most until you bring him down to the level of the man who has paid less. Here the shareholder has only paid 961*l.*, instead of 1800*l.*; then you pay the other contributories until you have brought them down to the same level. That would seem to me a proper mode of administration under these circumstances.

The other view of it resolves itself into this—that the trustee would be entitled to take, by way of distribution, moneys now which, of course, would be part of the bankrupt's estate, and then in respect of this proof the company would be entitled to rank against that sum with other creditors, and would thus get back some part of that which it had just paid into the estate. That is exactly what in *Grissell's Case* (1) was held not to be the right mode of administration. The right view is that the person liable as contributory must discharge himself in that character before he can set up that, as a creditor, he is entitled to receive anything, and a fortiori, as it seems to me, before he can set up that, as a contributory, he is entitled to receive anything.

(1) L. R. 1 Ch. 528.

I therefore think that this summons fails, and I dismiss it, with costs.

BUCKLEY J.

1905

ROWE'S TRUSTEE'S CLAIM.

[Leave to appeal was given.]

Solicitors for trustee in bankruptcy: *Morley, Shirreff & Co.*
Solicitors for liquidator: *Dollman & Pritchard.*

F. E.

In re JACKSON AND HADEN'S CONTRACT.

BUCKLEY J.

[1905 J. 2.]

1905

March 20.

Vendor and Purchaser—Contract of Sale—Power to rescind where Objection as to Title insisted on—Absence of Title to Mines in Property sold.

J. and others contracted to sell to H. a villa under a description which would include the mines and minerals under it. The contract provided (clause 13) that if the purchaser should "insist on any objection or requisition as to title which the vendors" should "be unable to remove or comply with," the vendors should be entitled to rescind the contract; and (clause 14) that any misstatement or omission in the particulars should form the subject of compensation.

The abstract shewed that the mines and minerals under the property had been reserved to the grantor by a conveyance to persons under whom the vendors claimed.

The purchaser insisted on a requisition that the vendors' title to the mines and minerals should be furnished:—

Held, that clause 13 did not apply so as to enable the vendors to rescind, and that under clause 14 the purchaser was entitled to a conveyance of the property, excepting the mines and minerals, but with compensation in respect of the excepted property.

DAVID JACKSON, Abraham Thomas Jackson, and Fanny Elizabeth Barlow entered into a contract in writing, dated October 25, 1904, with Harold John Haden, to sell to him "All that messuage or dwelling-house with the yard, stable, coach-house, garden, and appurtenances thereto belonging (including the wall on the eastern side of the premises and the hedge on the northern side of the premises), situate and being at Dawley Brook, Kingswinford, in the county of Stafford, and known as Yew Tree Villa, and now in the occupation of Harold John Haden."

BUCKLEY J.

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Clauses 13 and 14 of the contract were, so far as material, as follows:—

"13. . . . . If the purchaser shall insist on any objection or requisition as to title or evidence of title which the vendors shall be unable, or, on the ground of expense, shall decline to remove or comply with, then, notwithstanding any intermediate or pending negotiation, or any litigation which the purchaser may have commenced, or any attempt to remove or comply with such objection or requisition, the vendors shall be at liberty, by notice in writing, signed by them or their solicitor, and delivered to the purchaser or his solicitor, to rescind the contract. . . . Upon such rescission the purchaser shall be entitled to receive back his deposit money, but without interest, costs, or other compensation, except costs of suit allowed by the Court in any litigation."

"14. Any error, misstatement, or omission in the particulars shall not annul the sale, but if pointed out before the completion of the purchase, and not otherwise, shall form the subject of compensation, which shall be allowed by the vendors or purchaser as the case may require. . . ."

The purchase-money was 510*l.*

The vendors delivered an abstract of title which shewed that the mines and minerals under the property contracted to be sold had been reserved to the grantor of a conveyance dated in 1854, under which the vendors claimed.

The purchaser in his requisitions pointed out that he had not been supplied with an abstract of the vendors' title to the mines, and asked for a supplemental abstract.

The vendors' reply was: "The purchaser is bound by the contents of the deed [of 1854]. It is also well known, and was known to the purchaser, that the mines and minerals are all reserved in the Kingswinford property."

As a matter of fact the purchaser did not know that the mines under the villa were reserved, and he did know that the mines under some parts of the Kingswinford property were not reserved.

The purchaser repeated and insisted on his requisition, and ultimately offered (*a*) to accept a conveyance including the mines upon the vendors shewing a good title thereto, or (*b*)

to accept the property without the mines at a proportionately reduced price, or (*c*) to permit the rescission of the contract upon payment of suitable damages.

On December, 1904, the vendors gave notice in writing purporting to rescind the contract under condition 13.

The purchaser then took out a summons under the Vendor and Purchaser Act, 1874, for a declaration that the applicant was entitled to insist upon completion of the contract, with compensation in respect of the mines and minerals. This summons was adjourned into Court.

Astbury, K.C., and *Whitmore Richards*, for the purchaser. The Court is inclined to allow the vendor to rescind where he wishes to do so to avoid litigation. In modern forms the condition is expressed in wider language, e.g., in Key and Elphinstone's Precedents, 8th ed. vol. i. p. 254, where the vendor is given power to rescind "if the purchaser shall make and insist on any objection or requisition, either as to title, conveyance, or any matter appearing on the particulars, conditions or abstract, or otherwise," which the vendor is unable or unwilling to remove or comply with. The condition here is much narrower, and is confined to objections as to "title or evidence of title." There is no actual decision as to what is the effect of the condition where two distinct properties are contracted to be sold, and a title is shewn to one of them, but not to the other, but it is submitted that in such a case the condition as to rescission does not apply.

Where no title is shewn to any of the property the vendor cannot rescind. *Bowman* v. *Hyland* (1) explained by the Court of Appeal in *In re Deighton and Harris's Contract.* (2)

In *Powell* v. *Powell* (3) it was held that the vendor could not rescind where the sale had been declared invalid.

The meaning of a clause like condition 13 is that the vendors "shall be in a position to protect themselves against any unreasonable requisitions, and against unnecessary trouble and expense": *In re Monckton and Gilzean.* (4)

(1) (1878) 8 Ch. D. 588.
(2) [1898] 1 Ch. 458.
(3) (1875) L. R. 19 Eq. 422.
(4) (1884) 27 Ch. D. 555, 563.

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The vendors will probably rely on *Mawson* v. *Fletcher* (1), but the decision was based on the ground that the removal of the purchaser's objection would involve a long and expensive inquiry; and the interlocutory observations of Mellish L.J. are plainly in the purchaser's favour, and shew that where no title is shewn to part of the property the purchaser is entitled to specific performance with compensation.

[They also referred to *Nelthorpe* v. *Holgate* (2); *In re Jackson and Oakshott* (3); Dart's Vendors and Purchasers, 6th ed. pp. 178, 179.]

Mark Romer, for the vendors. A condition like this enables the vendor to rescind where a title is asked for which the vendor is unable or unwilling to furnish. This is an objection "as to title." *Mawson* v. *Fletcher* (1) is in point and in the vendors' favour. There is no difference between saying that the vendor has no title to one acre forming part of the property and saying that his title to one acre is bad; but in the latter case the vendor can rescind if an objection is insisted on: *Heppenstall* v. *Hose*. (4)

Where the condition gave a right to rescind if the purchaser insisted on "any objection or requisition in respect of the title," and it was afterwards discovered that there was a right of way over part of the land contracted to be sold, Chitty J. held that the vendor could rescind the contract: *Ashburner* v. *Sewell*. (5)

If the vendors cannot rescind, this is not a case for giving the purchaser a conveyance without the mines, but with compensation.

BUCKLEY J. By a contract dated October 25, 1904, the respondents agreed to sell a villa residence to the applicant under a description which would admittedly include the mines and minerals. The respondents did not own the mines and minerals; they had been reserved to the grantor by a conveyance to persons under whom the respondents claimed. They thought that it was well known in the district that the

(1) (1870) L. R. 6 Ch. 91.
(2) (1844) 1 Coll. 203; 66 R. R. 46.
(3) (1880) 14 Ch. D. 851.
(4) (1884) 51 L. T. 589.
(5) [1891] 3 Ch. 405.

mines under the estate of which this residence formed part had been reserved; but the applicant was unaware of any such reservation. The contract contained two conditions, which have been referred to in the argument. [His Lordship read clauses 13 and 14, and continued :—]

The fact is that the vendors had no title to part of the subject-matter of the contract—the mines and minerals. Is condition 13 applicable when the purchaser insists on a title being shewn by the vendors to the mines and minerals? There is an essential and obvious difference between an objection to a vendor's title as being imperfect, and an objection that he has no title at all. You cannot take an objection to that which has no existence. The purchaser's objection is that the vendors have no title to the mines and minerals; and if that is the case condition 13 has no application. That seems to follow from the decision of Hall V.-C. in *Bowman* v. *Hyland*. (1) There the condition was that if the purchaser should "make any objection or requisition in respect of the title, or of any other matter or thing whatsoever which the vendors" should "be unwilling on the ground of expense or otherwise to comply with," the vendors "should be at liberty to annul the sale"; and the Vice-Chancellor held that the condition did not enable a vendor to rescind the contract in a case where he failed to shew any title whatever.

The respondents, however, contend that the principle of that decision does not apply where there is an absence of title in the vendor to a part only of the property. In my judgment it does. In *Mawson* v. *Fletcher* (2) Mellish L.J. made the following interlocutory observation: "It may be conceded to you that, if there was a clear case of defect of title to part, you would be entitled to specific performance with compensation." That is the principal case on which Mr. Romer relies. The vendor in that case said that he had a title to the minerals. The purchaser said that the vendor had no title to them—that they belonged to the lord of the manor. The vendor replied that the reservation was the result of an enfranchisement as to which there was a condition, and that it

(1) 8 Ch. D. 588. (2) L. R. 6 Ch. 91, 93.

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would not be compensated for, and ultimately rescinded the contract. The question between the vendor and purchaser was whether the former had a title to the minerals, and the Court of Appeal said that the objection taken was an objection to title the removal of which would involve a long and expensive inquiry, and that the vendor was entitled to rescind the contract.

But where there is obviously no title the matter does not require investigation. *Mawson* v. *Fletcher* (1) is no authority in favour of the vendors in the present case, and the interlocutory observations of Mellish L.J. are against them.

In *In re Deighton and Harris's Contract* (2) Lindley M.R. said: "This case seems to me, when once understood, to be free from all serious difficulty. It is a case of vendor and purchaser, and it is one in which the vendor is not in the position of a man who agrees to sell property to which he has no title at all. It is not like the case of *Bowman* v. *Hyland*." (3) Then he refers to *Bowman* v. *Hyland* (3), and the head-note of the case is that "the ordinary condition of sale giving the vendor a power of rescission applies only where he has some title, not where he has none." That is a perfectly sound principle. You cannot say that there has been an objection to title where the title is admittedly non-existent. In my judgment, therefore, condition 13 does not apply. It is in a restricted form, and applies only to objections or requisitions "as to title or evidence of title."

In my judgment condition 14 is applicable. There has been an error, misstatement, or omission in the particulars by putting them in a form which would include the mines, although the vendors have not got the mines; and the purchaser is entitled to have the property at a reduced price by way of compensation for the mines which the vendors are unable to convey to him.

Solicitor for purchaser: *A. E. Bale, for Harwards & Co., Stourbridge.*

Solicitors for vendors: *Robbins, Billing & Co., for W. Waldron, Brierley Hill, Staffordshire.*

(1) L. R. 6 Ch. 91, 93. (2) [1898] 1 Ch. 458, 462. (3) 8 Ch. D. 588.

F. E.

In re NORTH OF ENGLAND STEAMSHIP COMPANY.

BUCKLEY J.

1905

April 1.

Company—Special Resolution—Notice of both Meetings in one Document—Special Clause in Articles of Association—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

The articles of association of a company limited by shares provided (in clause 70) that seven days' notice at the least of a general meeting should be given to the members, and continued as follows: "Whenever it is intended to pass a special resolution, the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting."

The directors gave notice in writing that an extraordinary general meeting of the company would be held on February 15, 1905, at a certain hour and place, when a resolution subjoined (which was for reduction of capital) would be proposed. The notice proceeded as follows: "Should such resolution be duly passed by the required majority, the same will be submitted for confirmation as a special resolution to a subsequent general meeting of the company which will be held on Friday, the 3rd day of March, 1905, at the same time and place":—

Held, that the articles of association could not override s. 51 of the Companies Act, 1862; that the concluding paragraph of the document, being only notice of a contingent meeting, was not notice of a meeting within the meaning of the section; and that the resolution had therefore not been duly confirmed.

THE shareholders of the company passed the resolution referred to in the head-note on February 15, 1905, by the required majority, and the resolution was confirmed at a meeting held on March 3.

The company then presented a petition asking the Court to confirm the reduction of capital to be effected by the special resolution.

Martelli, in support of the petition. Having regard to art. 70, the resolution has been duly passed and confirmed. In *Alexander* v. *Simpson* (1) the Court of Appeal held that a notice like this was invalid as regards the second meeting because it was conditional; but in that case there was no such article as art. 70 of this company. Sect. 51 of the Companies Act, 1862,

(1) (1889) 43 Ch. D. 139.

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points out how a special resolution is to be brought about, and says that "Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company."

The regulations in this case do prescribe the manner in which notice of a meeting may be given, by saying that the two meetings may be convened by one notice. It is submitted, therefore, that the special resolution complies with s. 51.

The article is one which for some years has been considered as a common form, and similar articles have been frequently acted on.

BUCKLEY J. Sect. 51 of the Companies Act, 1862, provides that "Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company." The regulations of this company contain an article which provides as follows: "Whenever it is intended to pass a special resolution the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting." It is necessary to determine whether s. 51 allows a notice of a contingent meeting. The notice which was sent out in this case is in the same terms as the notice in *Alexander* v. *Simpson* (1), in that it concludes as follows: "Should such resolution be duly passed by the required majority, the same will be submitted for confirmation as a special resolution to a subsequent extraordinary general meeting of the company which will be held on Friday, the 3rd day of March, 1905, at the same time and place." It is a notice that only in a certain contingency, namely, that of the resolution being passed at the first meeting, will there be any second meeting.

The decision of the Court of Appeal in *Alexander* v. *Simpson* (1) was on the articles of association. It was unnecessary

(1) 43 Ch. D. 139.

there to consider also the effect of the statute. The Court of Appeal held that the regulations had not been complied with, and I desire to point out why. The relevant article in that case was art. 52, which provided as follows: "Seven days' notice in writing specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members before every general meeting, but the non-receipt of such notice shall not invalidate the proceedings at any general meeting." The company in that case gave such a notice as that which is now before me; and Bowen L.J., after reading that portion of the notice, which was similar to the one before me, said (1): "If that paragraph is to be read as a notice that the subsequent extraordinary general meeting of the company would only be held on that day in the event of the passing of the resolutions at the former meeting, it is obvious that it would not be a good notice, because it would leave a shareholder who got the notice in ignorance whether or no the general meeting" (that is to say, the second meeting) "of the 29th of July was to be held." The Court of Appeal therefore, on the document before them, namely, the articles of association, held that notice of a contingent meeting was not notice of a meeting within art. 52 of those articles of association. It was not necessary for that Court to determine whether, if there was a special article purporting to make such a notice valid, and a compliance with that article, such a notice of the meeting would be good within the Act. What I have to decide is whether, there being such a special article as I have referred to and a notice complying with that article, s. 51 of the Act of 1862 has been complied with. The section says that "notice of any meeting" shall, for the purposes of the section, be deemed to be duly given when it is given "in manner prescribed by the regulations of the company." On the construction of those words, with the assistance of the decision of the Court of Appeal in *Alexander* v. *Simpson* (2), I have to decide whether notice of a contingent meeting is notice of a meeting. *Alexander* v. *Simpson* (2) decides, I think, plainly that it is not. The petitioners' counsel

(1) 43 Ch. D. 148. (2) 43 Ch. D. 139.

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relies on the words "in manner prescribed by the regulations of the company," and endeavours to get over the difficulty by saying that the regulations in this case provide for notice of a contingent meeting. Does that get over the difficulty? Certainly not. The articles cannot override the Act of Parliament. The Act speaks of giving "notice of any meeting." The manner of giving the notice may be determined by the articles, but the subject-matter of the notice must be a meeting. *Alexander* v. *Simpson* (1) decides that a contingent meeting is not a meeting. The point here is exactly the same as in *Alexander* v. *Simpson* (1), but arises on the statute instead of on the articles.

I desire to add that this is not mere pedantry, but is to my mind a matter of substance. A special resolution is a serious and solemn thing. The Act of Parliament provides that it shall be submitted to two meetings. The notice of the second meeting ought to be an efficient and effectual thing. The Legislature must have contemplated that persons might stay away from the first meeting because they knew they could come and object at the second meeting. The second meeting is not a mere form: it is a solemn reality which the Act of Parliament requires; and in my judgment it is not giving due effect to the Act to endeavour to give the go-by to the second meeting by an article such as the present. The effect is that, after the first meeting has been held, nobody knows whether there is to be a second meeting or not unless he makes inquiry and finds out in some way what the result of the first meeting was.

I therefore hold that the special resolution has not been passed and confirmed in the manner provided by the Act of Parliament, and I dismiss the petition.

Solicitors for company: *Gibson & Weldon, for Bertrand Watson, Stockton-on-Tees.*

(1) 43 Ch. D. 139.

F. E.

ELLIS *v.* ELLIS.

WARRINGTON J.

1905

Feb. 28; *March* 2.

[1904 E. 1061.]

Letters of Administration—Grant of—Will appointing Executor—Suppression of Will—Revocation of Grant—Acts of Administrator.

A grant of letters of administration obtained by suppressing a will which appointed an executor is void ab initio, and all dispositions of the assets by the supposed administrator are void also, except acts done in a due course of administration.

Abram v. *Cunningham*, (1677) 2 Lev. 182, and *Graysbrook* v. *Fox*, (1564) 1 Plowd. 275, examined and applied.

THIS was an action for foreclosure which was tried with witnesses. In the course of the trial the validity of certain payments made by an alleged administrator became material as an acknowledgment which would prevent the Statute of Limitations being successfully raised as a bar to the plaintiffs' claim; and the main question for decision, and the only one requiring a detailed report, was the position of an administrator and the result of his dealings with the assets, when the grant of letters of administration had been revoked by the subsequent probate of a will appointing an executor. The facts, so far as material, and the result of the evidence as found by the Court, were as follows:—

Prior to his death in August, 1892, George Ellis the father deposited with the defendant William Ellis, by way of equitable mortgage, the lease of his house, 13, Upper Charlton Street, Marylebone, to secure 100*l.* then advanced by the defendant to George Ellis the father with interest.

On August 21, 1892, George Ellis the father died; and on his death the defendant William Ellis demanded of George Ellis, a son of the deceased, payment of the 100*l.* debt, threatening if he was not paid to foreclose.

On October 20, 1892, George Ellis the son borrowed from his uncle James Ellis 100*l.*, and the same day paid it, and a sum of 3*l.* for interest to the defendant William Ellis, receiving from him the lease. He then gave to James Ellis a promissory

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note for 100*l.*, and deposited the lease with him. The promissory note referred to the fact that the lease was deposited as security for the 100*l.*

On November 9, 1892, letters of administration of the estate of George Ellis the father were granted to George Ellis the son, on the assumption that the father had died intestate; there was in fact a will, and George Ellis the son knew of it, though he said at the trial it was, as he thought, not properly attested. That will appointed an executor and bequeathed the house to a sole beneficiary. The above-mentioned payments were the only acts of administration which the Court on the evidence found to have been done by George Ellis the son.

On November 23, 1892, an action was commenced against George Ellis the son for revocation of the grant of administration and to obtain probate of the will. In June, 1893, the plaintiffs in that action obtained judgment, the will was proved in solemn form, probate was granted to the executor, the letters of administration were revoked, and George Ellis the son was ordered to pay the costs of the action. These he had not paid, nor was it shewn that he had fully accounted for rents and other moneys received while he was administrator.

In 1896 James Ellis made a claim against the sole beneficiary under the will of George Ellis the father for payment of the 100*l.* advanced to George Ellis the son; but his claim was repudiated, and he took no steps to assert it.

Except the payment to William Ellis under the circumstances hereinbefore mentioned, the Court found as a fact that there had not been any payment of principal or interest, nor had there been any acknowledgment of the 100*l.* debt.

In July, 1902, the leasehold house was sold to the defendant William Ellis, the original mortgagee, by the beneficiary under the will, and at the time of this sale it was stated that George Ellis the son asserted that the lease was lost, and an agreement under seal, dated July 12, 1902, was accordingly entered into by the vendor and purchaser to provide for the indemnity of the purchaser against any adverse claim in this respect.

In August, 1903, James Ellis died, having by his will appointed the plaintiffs his executors.

On October 19, 1904, this action was commenced by the executors of James Ellis, who had retained possession of the said lease, against William Ellis, claiming a declaration that the plaintiffs were entitled as equitable mortgagees to a charge for 100*l.* and interest on the premises comprised in the said lease by virtue of the deposit thereof with the defendant and the subsequent transfer thereof to the testator James Ellis; an account of what was due on the security; and in default of payment by the defendant, foreclosure or sale.

The defendants denied that the plaintiffs were mortgagees, and claimed the benefit of the Real Property Limitation Act, 1874, and of 3 & 4 Will. 4, c. 27, and all other Statutes of Limitations.

Norton, K.C., and *Ashton Cross*, for the plaintiffs. The borrowing of money for the purposes of the estate and the payment of interest on October 20, 1892, must be taken as acts done by George Ellis the son in his capacity of administrator, because though administration was not actually granted till November 9, 1892, still the title of an administrator, when letters of administration are granted, relates back to the time of the death: *Foster* v. *Bates* (1); *Welchman* v. *Sturgis* (2); *In the Goods of Pryse*. (3) What was done by George Ellis the son in October, 1892, was done for the benefit of his father's estate, and the subsequent grant of letters of administration ratified the acts done and made them the acts of the administrator: *Hill* v. *Curtis* (4); *Ex parte Phillips*. (5) Acts done, as these were, during the existence of the letters of administration are valid, as acts of an administrator, and would not be invalidated by the subsequent probate of the will. These acts are sufficient to prevent the Statutes of Limitation from barring this claim.

H. Terrell, K.C., and *Manning*, for the defendant. A grant of letters of administration obtained by the suppression of a will which appoints an executor is void ab initio, and all

(1) (1843) 12 M. & W. 226, 233; 67 R. R. 311, 317.
(2) (1849) 13 Q. B. 552.
(3) [1904] P. 301.
(4) (1865) L. R. 1 Eq. 90, 100.
(5) (1886) 18 Q. B. D. 116.

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dispositions of and dealings with the assets by the supposed administrator are void also: *Abram* v. *Cunningham* (1); *Woolley* v. *Clark* (2); Williams on Executors, 10th ed. p. 461. In *Boxall* v. *Boxall* (3) no executor was appointed, and on that ground *Abram* v. *Cunningham* (1) was distinguished; but the validity of that decision was recognised. The acts done by the supposed administrator, therefore, do not amount to any acknowledgment of the debt, and the plaintiffs' claim is barred by the Statutes of Limitation.

Norton, K.C., in reply. Even if the letters of administration in this case were void ab initio, still acts done by the supposed administrator in a due course of administration are good: *Graysbrook* v. *Fox* (4); *Parker* v. *Kett* (5); Williams on Executors, 10th ed. p. 462. Everything done by an administrator in the due course of administration is good. The estate had the benefit of this 100*l.*, otherwise the lease would have been sold. In *Abram* v. *Cunningham* (1) there was nothing to shew that the estate had derived any benefit from what had been done by the administrator; there was no plea that what had been done there was done in a due course of administration. In this case what was done was done in due course of administration; the estate derived a benefit from this payment and must bear the burden. James Ellis can claim by subrogation in the place of George Ellis, and is entitled to stand as a creditor on the purchase-money of the estate to the extent to which the mortgage money has been properly applied: *Devaynes* v. *Robinson*. (6) James Ellis made the payment of this 100*l.* to the administrator for the purpose of paying off a creditor.

[*Bodger* v. *Arch* (7) and *Thomson* v. *Harding* (8) were also cited.]

H. Terrell, K.C., replied on the fresh cases cited in reply.

Cur. adv. vult.

(1) 2 Lev. 182.
(2) (1822) 5 B. & Ald. 744; 24 R. R. 546.
(3) (1884) 27 Ch. D. 220.
(4) 1 Plowd. 275, 282.
(5) (1702) 1 Ld. Raym. 658, 661.
(6) (1857) 24 Beav. 86.
(7) (1854) 10 Ex. 333, 339.
(8) (1853) 2 E. & B. 630.

March 2. WARRINGTON J., after stating the nature of the action and the facts as given above, continued:—If the letters of administration had remained unrevoked, then, I think, they would have related back to the death of George Ellis the father, and the pledge of the house by the administrator for the purpose of securing money borrowed for the payment of the debt would have been valid, the statute would not have run, and the plaintiffs would have been entitled to succeed: see *Foster* v. *Bates*. (1) But, unfortunately for the plaintiffs, there was in existence a will by which an executor was appointed; that will was duly proved, and the administration was revoked. Under those circumstances, I think it is clear law that the grant of letters of administration is wholly void, and that, speaking generally, dispositions of the assets by the supposed administrator are void also, the ground of this being that the assets are vested in the executor from the death, and the supposed administrator has no property in them, and no power of dealing with them.

This was determined in *Abram* v. *Cunningham*. (2) In that case a testator, David Cunningham, being possessed of certain leaseholds as executor, died on September 15, 1665, leaving a will whereby he appointed executors, who of course became executors of the original testator. On October 21, 1671, administration de bonis non of the original testator was granted to a creditor, the Ordinary having no notice of the will. On March 1, 1672, the administrator sold the leaseholds to the plaintiff for 1000*l*. On February 13, 1673 (the surviving executor of the will of David Cunningham having renounced probate) the administration granted to the creditor was revoked and administration of the estate of the original testator was granted to the defendant. The question was whether the plaintiff or the defendant had the better title, and it was decided in favour of the defendant. The grounds of the decision appear in the argument for the defendant, and are—that if there are in fact executors, the Ordinary has no power to grant administration, the property is vested in the executors, and the letters of administration and the dealings by the

(1) 12 M. & W. 226, 232; 67 R. R. 311. (2) 2 Lev. 182.

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administrator under them were simply void. This is recognised as good law by Kay J. in *Boxall* v. *Boxall* (1), and in the last edition of Williams on Executors, p. 461.

But it is contended by the plaintiffs that there is an exception to the general rule of acts done in the due course of administration, and that such acts are not void. For this reliance is placed on several authorities, and in particular on a dictum in the case of *Graysbrook* v. *Fox*. (2) The head-note of that case is as follows: "A. makes his will and appoints an executor, and dies, the Ordinary, without taking notice of the will, commits administration to J. S.; before the executor has proved the will, the administrator sells the goods of the deceased, and the executor afterwards proves the will, and brings detinue for the goods against the vendee, and adjudged that he should recover, for the probate supersedes the administration ab initio, and the sale made under it." So far, it is to be observed, the decision is the same as that in *Abram* v. *Cunningham* (3); the head-note then goes on: "but otherwise if it be averred that the sale was made to discharge the funeral expenses or debts which the administrator or executor was compellable to pay, for there such sale shall be indefeazible for ever." The last part of that head-note appears to be founded upon a dictum of Walsh J. which is to be found on p. 282, and is as follows: "But Walsh said, if the defendant here had averred that the administrator had aliened the goods to him for a certain sum, and had employed the money in discharge of the funeral, or of the debts of the deceased, or about other things which an executor should be forced to do, there the sale for such purposes should not be avoided, but should remain indefeazible; and the reason is, because by the commission of the administration to him by the Ordinary, who was ignorant of the testament, he has a colour of authority, though it is not a rightful one, and he that has the right suffers no disadvantage although he be bound by the act of the administrator, for it is no more than he himself was compellable to do, and the administrator having done that which the executor himself was obliged to do, his act shall be allowed good, because the

(1) 27 Ch. D. 220. (2) 1 Plowd. 275. (3) 2 Lev. 182.

executor himself is thereby freed and excused from the trouble of doing it. And so inasmuch as the administrator was compellable to do it, (for if he was sued for a thing which ought to be done, he could not disable or discharge himself for the time) it is reasonable, and no detriment to any one that the thing done should remain stable and firm without impeachment." The essence of that statement appears to me to be that the act in question was one which the administrator was compellable to do.

But in this case, though as between the real and the supposed legal personal representative the payment of the debt may well be treated as proper, so as to entitle the latter to credit, the mortgage stands on a different footing. This was essentially a voluntary act, no title was in fact conferred by it, and on the authorities I have cited I hold it to have been simply void.

The plaintiffs then contend that George Ellis, having paid off the debt for the benefit of the estate, was entitled to stand in the place of the creditor, and that he transferred that right to James Ellis, who actually found the money. But, granting that such would be the right of George Ellis and that the plaintiffs could assert that right by subrogation, any claim founded on it would now be barred by the Statute of Limitations. The debt is of course long since barred, and all claims under the original security are now barred also, for in this aspect of the case the payment of the interest was made by a stranger, and was not such a payment as would prevent the statute from running.

Moreover, even if it could be otherwise supported, a claim by way of subrogation to the rights of George Ellis would be effectually met by establishing his indebtedness to the estate in respect of the costs of the probate action, and possibly in respect of rents and other moneys.

On the whole I think the present action fails, and there must be judgment for the defendant with costs.

Solicitors: *A. B. Clifton; Henry Fisher, Junr.*

W. C. D.

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March 14, 15, 16.

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[1904 B. 2045.]

Trust—Partner—Trustee—Leaseholds forming part of Trust Estate—No Right of Renewal—Reversion purchased by Trustee—Ownership of the Fee.

The doctrine that wherever the reversion on a lease which forms part of a trust estate is purchased by the trustee of the lease the purchase is for the benefit of the trust estate applies only to leaseholds which are renewable by custom or contract. Therefore, if a trustee of a lease which is not thus renewable buys the reversion on the lease, he may, in the absence of fraud, hold it for his own benefit.

Longton v. *Wilsby*, (1897) 76 L. T. 770, explained and followed.

Action for a declaration that in making a valuation of a share in a brewery partnership the freehold of the business premises ought to be treated as forming part of the assets.

In 1854 William Webb was possessed of certain leasehold properties at Aberbeeg, partly under a lease of 1839, which expired in 1901, partly under a lease of 1840, which expired in 1903, and the remainder under a yearly tenancy. On these premises he was carrying on three separate businesses, namely, those of a brewer, a maltster, and a wine and spirit merchant. On June 16, 1854, he made over the brewery business to his sons W. H. Webb and J. R. Webb, and his son-in-law J. Crook. The partnership was to continue for seven years; the partners were to hold equal shares, and were to pay to W. Webb 70*l.* a year rent and interest on the value of the brewery plant. No lease of the premises to the partners was executed. W. Webb continued to carry on the other businesses on another part of the same premises.

In 1857 another son-in-law, T. A. Bevan, was admitted into the partnership. In 1863 Crook retired. In 1864 Bevan assigned his share to W. Webb and Crook as trustees for his wife and children. The brewery was still carried on under the terms of the original agreement, and the partners were W. H. Webb and J. R. Webb, who each held a third, and the trustees, who held the remaining third. In 1865 T. A. Webb,

another son of W. Webb, became a partner, and the shares were thenceforth held in fourths. In 1866 W. H. Webb died, and W. Webb succeeded to his share. Bevan died in 1871. In 1876 a partnership deed was executed; the partnership was to continue till 1903, but no lease of the premises was granted.

By a deed of 1880 the widow and children of Bevan assigned their share to the other partners upon trust to carry on the business and make certain payments to the Bevans.

In the same year one moiety of the reversion expectant on the two leases of 1839 and 1840, and of the property of which W. Webb was yearly tenant, was put up for sale by auction; it was bought by W. Webb, and conveyed to him in January, 1881. There was nothing to shew that he bought that reversion otherwise than for his own benefit.

Crook died in 1882, and W. Webb died in 1883, leaving J. R. Webb and T. A. Webb his executors, and giving them beneficially his interest in the leaseholds and the reversion. They also became entitled under his will to the other businesses. In 1893 J. R. and T. A. Webb bought the other moiety of the reversion. In the same year articles of partnership were agreed to as the result of a compromise of litigation, and under them the Bevans took a one-fourth share. By the articles the partnership became tenants to the owners of the brewery premises. In 1900 J. R. and T. A. Webb turned the malting business into a limited company by the name of J. R. & T. A. Webb, Limited. In 1901 another action was commenced by the Bevans; a preliminary point was decided—*Bevan* v. *Webb* (1)—and this action also was compromised. In 1902 a third action was brought by them for a dissolution and an account. That action was compromised by an agreement that the Webbs should purchase the interest of the Bevans in the partnership at a sum to be ascertained by valuation. In making the valuation the question arose whether the reversion belonged to the brewery partnership on the ground that W. Webb was a trustee for the Bevans when he bought one moiety, and that J. R. and T. A. Webb were co-partners with the Bevans when they bought the second half. The Bevans

(1) [1901] 2 Ch. 59.

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brought this action against the other partners and the representatives of W. Webb for a declaration that the reversion formed part of the assets. Other questions were also raised, but they do not call for a report.

H. Terrell, K.C., and *C. Lyttelton Chubb*, for the plaintiffs. The freehold of the brewery premises belongs to the partnership. When W. Webb bought the first half of the reversion the partners were tenants of the premises; he was an express trustee for the plaintiffs, and was also a co-partner with them in the brewery. The principle is laid down in *Keech* v. *Sandford*. (1) Wherever a lease forming part of trust property is renewed by the trustee, the renewal is held to be for the benefit of the trust estate. That principle also applies between partners, between tenant for life and remainderman, and, in fact, to any person in a fiduciary position: *In re Lord Ranelagh's Will*. (2) The doctrine does not rest upon any suggestion of fraud on the part of the trustee, but on the necessity of safeguarding the interests of the cestui que trust. It is not a question of contract, but of policy. The principle applies whether the lease is renewable or not. The decision in *In re Lord Ranelagh's Will* (2) was not based on the fact that the lease in that case was renewable, although no doubt if a lease is renewable the trustee is bound to take advantage of that fact. The principle applies to the purchase of a reversion as well as to the renewal of leases: notes to *Keech* v. *Sandford* (3); *Phillips* v. *Phillips*. (4) If W. Webb had obtained a renewal of the leases, it would have been for the benefit of the brewery partnership whether he acted as trustee or as partner.

The interest of the partners continued although the leases came to an end. When that happened and the partnership expired, the business with all the assets including the reversion would have to be sold: *Featherstonhaugh* v. *Fenwick*. (5) A partnership is entitled to the benefit of a renewal which

(1) (1726) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.
(2) (1884) 26 Ch. D. 590.
(3) 2 W. & T. 7th ed. p. 705.
(4) (1885) 29 Ch. D. 673.
(5) (1810) 17 Ves. 298; 11 R. R. 77.

takes place after the expiration of the partnership: *Clegg* v. *Fishwick*. (1)] WARRINGTON J.

[WARRINGTON J. No doubt the principle applies to partners; but the question is whether this partnership had a lease in that sense.] 1905 BEVAN v. WEBB.

W. Webb could not have said that they were not entitled to a lease.

[WARRINGTON J. Had they more than a licence to use premises?—*Edwardes* v. *Barrington*. (2) W. Webb did not in terms give a lease to the partnership.]

He had bound himself by the documents and the course of affairs, so that as against us he could not dispute our right to a lease: Lindley on Partnership, 6th ed. p. 319.

The purchase by J. R. and T. A. Webb of the second moiety of the reversion was no doubt intended to be for the benefit of the malting firm; but they were our partners in the brewery, and the purchase will be held to be for the benefit of that business.

Warmington, K.C., and *J. Rolt*, for the defendants other than the malting company. The plaintiffs have not brought themselves within the doctrine of *Keech* v. *Sandford*. (3) The brewery partnership never had exclusive possession or a lease of the premises. At the outside, what they had was a licence to use part of the premises for the brewery, subject to the right of W. Webb to go through the buildings for the purposes of his other businesses, and to reside there. There never was a reversion expectant on any interest vested in the partnership. With respect to the purchase of the first moiety of the reversion, it is clear that nothing that happened afterwards could prejudice the right of W. Webb to hold that moiety for his own benefit. If the brewery were ever entitled to the reversion they were entitled to it then. There is nothing in any of the cases cited to shew that W. Webb's purchase was not a good purchase for his own benefit. The judges say there must be a connection between the property belonging to the partnership or to the trust estate and the property of which the purchaser is said to

(1) (1849) 1 Mac. & G. 294, 298. (2) (1902) 50 W. R. 358; 83 L. T. 548.
(3) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.

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become a constructive trustee. The partnership property or the trust estate is the foundation of that which is afterwards acquired by the trustee or partner. That which is acquired accrues out of that which is the property of the trust estate or partnership. This purchase cannot be described in that way. It was not a graft upon or connected with property belonging to the trust estate or partnership. It was connected only with private property of W. Webb.

The brewery partnership had no right of renewal in this case, and the doctrine that a trustee who buys the reversion on a lease which forms part of the trust estate does so for the benefit of the trust estate does not apply unless the lease is renewable by custom or contract, and in all the cases the presumption that the doctrine applies is treated as rebuttable: *Randall* v. *Russell* (1); *Hardman* v. *Johnson* (2); *Aberdeen Town Council* v. *Aberdeen University*. (3) The point is concluded by *Longton* v. *Wilsby*. (4) Therefore the plaintiffs cannot claim the moiety of the reversion purchased by W. Webb on the ground that he was their trustee. Nor can they do so on the ground that he was their partner: *Burdon* v. *Barkus*. (5)

They cannot claim the moiety purchased by J. R. and T. A. Webb. No fiduciary relationship existed at that time.

Cave, K.C., and *P. F. Stokes*, for the company. The plaintiffs knew all the facts and had separate solicitors, and they cannot be heard to say that they did not know what their rights were.

H. Terrell, K.C., in reply. *Longton* v. *Wilsby* (4) is obviously wrong. Stirling J. is reported to have there said that there was no case in which the doctrine of *Keech* v. *Sandford* (6) had been applied to leaseholds which were not renewable by custom or contract. There are, in fact, many such cases. *Longton* v. *Wilsby* (4) was distinguished in *In re Biss* (7), but it has never been followed.

[WARRINGTON J. It must be a mistake in the report.

(1) (1817) 3 Mer. 190; 17 R. R. 56.
(2) (1815) 3 Mer. 347; 17 R. R. 95.
(3) (1877) 2 App. Cas. 544, 553.
(4) 76 L. T. 770.
(5) (1862) 4 D. F. & J. 42.
(6) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.
(7) [1903] 2 Ch. 40, 47.

Stirling J. was evidently referring to the purchase of a reversion, not to the renewal of a lease.]

Randall v. *Russell* (1) and *Hardman* v. *Johnson* (2) turned on special facts. In the last-named case Sir W. Grant said (3) that it would be dangerous to allow a trustee of a lease to purchase the reversion. That proposition has often been cited with approval, although it is true that his Honour changed his mind the next day. As between tenant for life and remainderman the presumption is rebuttable, but not between trustee and cestui que trust: *In re Biss* (4); *Acheson* v. *Fair*. (5)

WARRINGTON J. stated the facts, and proceeded:—This is beyond dispute, and has not been disputed by the defendants, that if a trustee or a person in the position of a trustee, holding as part of his trust property a lease, takes the renewal of that lease, that renewed lease is treated as a graft or addition to the trust property and itself forms part of the trust property. As to that I think there can be no doubt. And I think also there is no doubt that the principle is applicable to the relations between partners; and if part of the assets of the firm consists of leasehold premises, one partner cannot take a new lease of those premises and then insist on keeping that for his own benefit.

But it is sought to extend that further by saying in equally general terms that no such trustee or partner is capable of taking to himself the reversion expectant on a lease of which the trust estate or the partnership, as the case may be, is possessed. Now, is that proposition sound? In my opinion, in the wide terms in which I have expressed it, and in which alone it must be expressed, if the plaintiffs are to succeed, it is not sound. The question was first raised in a suit of *Randall* v. *Russell* (1), before Sir William Grant. In that case a testator had been possessed of certain premises held under a college lease. He had given these premises, with others, to his wife

(1) 3 Mer. 190; 17 R. R. 56.
(2) 3 Mer. 347; 17 R. R. 95.
(3) 3 Mer. 352.
(4) [1903] 2 Ch. 40, 56.
(5) (1843) 3 D. & War. 512; 61 R. R. 115.

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during her widowhood, with gifts to other persons after her second marriage. After his death his widow took a new lease, and she subsequently purchased the reversion, not from the college, but from a man to whom the college had conveyed it. Now, it will be noticed, therefore, that that case raised both the question as to the renewed lease and the question as to the title to the reversion. Sir William Grant held, in accordance with the general principle which I have stated, that the new lease did belong to the estate of which the widow had been tenant for life, but that the reversion did not. And the grounds on which he so held are most important. His judgment is on p. 197 on this point, and he says: "No case was mentioned, in which this sort of equity had been carried to such a length. The ground commonly stated, on which the renewed lease becomes subject to the trusts of a will disposing of the original lease, is, that the one is merely an extension or continuation of the other. But the fee is a totally different subject, which the testator had it not in his contemplation to acquire or dispose of. Yet, if Mrs. Russell had purchased from the college, it might be said, that she thereby intercepted and cut off the chance of future renewals, and, consequently, made use of her situation to prejudice the interests of those who stood behind her; and there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests; although, as I have already said, I am not aware of any decision to that effect. But, here, the situation of the parties was altered by the act of the landlord, without any intervention of the tenant for life. The college had aliened the property to an individual. The benefit attending the tenant-right of renewal with a public body was gone. A lease at a rack-rent was all that was to be expected from the private proprietor. Mrs. Russell's purchase from the first vendee wrought no change whatever in the situation of those who had had interests in the lease as a college lease. Before she bought, it had become a lease that must expire at the end of fourteen years. Whether Mr. Hull," who was the purchaser of the reversion, "sold or kept the reversion, was a matter of indifference to them." And then he proceeded to hold that

the tenant for life did not hold the reversion in trust for the persons interested under the will, and he makes his reasons as plain as reasons can be made. Holding under a college lease there was a reasonable expectation of renewal at the old rent and under the old terms; holding from a private individual there was no such expectation, and the tenant could not expect to get anything but an ordinary lease, if he got it at all, in competition with other persons, and at a rack-rent, and the learned judge distinctly refused to apply to such a case the principle which he said he thought might be applied if the lease had remained a college lease. In the same volume of Merivale is another case before the same learned judge, the case of *Hardman* v. *Johnson* (1); but I do not refer to it further, because, although in that particular case he also held that the reversion did not belong to the trust estate, the reasons for that decision are not given, and it is, therefore, of not very much value as an authority.

No cases bearing on the decision in *Randall* v. *Russell* (2) have been referred to until the year 1885, when *Phillips* v. *Phillips* (3) came before the Court of Appeal. *Phillips* v. *Phillips* (3) was just the case which Sir William Grant said he thought might be determined in favour of the trust estate. In that case a testatrix had certain leaseholds which were renewable by custom, that is to say, they were leaseholds held under the Bishop of London, the lease of which the Bishop for many years had been in the habit of renewing on payment of a certain fine. There was no legal obligation, but as a matter of fact the Bishop continued to renew on those terms, and every tenant of any such property had the expectation that that lease would be so renewed. The testatrix devised those leaseholds to one James Phillips for the residue of his term, and after the death of James to his children. James renewed the leases more than once, and he afterwards purchased the reversion. There was no dispute as to the renewed lease, but the question was whether his children became entitled to the reversion. It was held in the Court of Appeal that they did;

(1) 3 Mer. 347; 17 R. R. 95. (2) 3 Mer. 190; 17 R. R. 56.
(3) 29 Ch. D. 673.

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but why? I think quite plainly, because the case was just that which Sir William Grant referred to in *Randall* v. *Russell* (1) as a case in which that equity might be applied. The Master of the Rolls, who gives the first judgment there, puts it in perfectly plain terms; he says (2): "The will must be construed with reference to the facts which existed at the time when it was made, and which must be presumed to have been known to the testatrix. She was possessed of a term for twenty-one years created by a lease granted shortly before she made her will; her interest was of a somewhat peculiar nature, for the yearly rent was only 3*l*., but it was an ecclesiastical lease, and upon payment of a fine and upon surrender within a limited time, it gave a right to renewal. She would, therefore, consider herself to be possessed of a renewable lease, and she must be assumed to have intended to dispose of a renewable lease by her will. It is a well-established doctrine of a Court of Equity that the trustee or tenant for life of a lease can renew it only for the benefit of the estate. We are now asked to apply this doctrine to a case where the tenant for life has purchased the reversion. This is, no doubt, an extension of the principle; but I think that it is an extension which we ought to sanction."

I ought to mention that *Randall* v. *Russell* (1) had been cited there, but cited to distinguish it so far as the decision was concerned, and to rely upon it so far as the dictum of Sir William Grant was concerned. What I think the Master of the Rolls in that case intended to do was to turn the dictum of Sir William Grant into a decision of his own, and not to go further. He did not intend to overrule the decision in *Randall* v. *Russell* (1) in the least.

Cotton L.J. gives judgment to the same effect, premising it by the statement that the question was, "Who has the right to what was a reversion in property comprised in an ecclesiastical lease?" Lindley L.J. concurred in the judgment, and gave no reasons of his own, but merely concurred in the judgment of the other judges.

In my judgment that case carries the matter no further

(1) 3 Mer. 190; 17 R. R. 56.
(2) 29 Ch. D. 681.

forward. It is a decision which is perfectly consistent with *Randall* v. *Russell*. (1) It carries out that which Sir William Grant, though hesitating to affirm it positively, thought possibly might be the law.

But the matter does not stay there. So far I have expressed my own view upon the effect of those two cases; but the matter came distinctly for decision before Stirling J. in *Longton* v. *Wilsby*. (2) Now there the testator had been possessed of certain leaseholds not renewable, and had given them to a brother for life with certain remainders over. The second tenant for life (not the first), during the life of the first, had purchased the reversion, and the question there was whether he was a trustee for the remainderman: again the exact question which I have to decide. *Randall* v. *Russell* (1) was referred to, as was *Phillips* v. *Phillips* (3), and Stirling J. in his judgment stated *Randall* v. *Russell* (1), quoting that part of the judgment which I have read, and then said (4): "That is the decision eighty years ago of a very eminent judge, and, as far as I can find, it has not been overruled nor dissented from." Then there is a reference to *Phillips* v. *Phillips* (3), stating in express terms that that was a case with reference to leasehold renewal by custom. Then it goes on: "And the grounds of the decision are given by the Master of the Rolls. He says: 'She was possessed of a term of twenty-one years created by a lease granted shortly before she made her will; her interest was of a somewhat peculiar nature, for the yearly rent was only 3*l.*; but it was an ecclesiastical lease, and upon payment of a fine, and upon surrender within a limited time, it gave a right to renewal. She would therefore consider herself to be possessed of a renewable lease, and she must be assumed to have intended to dispose of a renewable lease by her will. It is a well-established doctrine of a Court of Equity that the trustee or tenant for life of a lease can renew it only for the benefit of the estate. We are now asked to apply this doctrine to a case where a tenant for life has purchased the reversion. This is no doubt an extension of the principle, but I think that it is an extension

(1) 3 Mer. 190; 17 R. R. 56.
(2) 76 L. T. 770.
(3) 29 Ch. D. 673.
(4) 76 L. T. 771.

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which we ought to sanction.' Cotton and Lindley L.JJ. take the same view. But none of the learned judges indicated any intention of overruling *Randall* v. *Russell* (1) or departing from what was there laid down. That case was cited, and the passage I have read, from 'if Mrs. Russell had purchased from the college' down to 'decision to that effect,' was referred to and relied on on behalf of the remaindermen, and the Court adopted the view expressed by Grant M.R. in that passage. If *Randall* v. *Russell* (1) is, as I think, a binding authority, the present case falls well within it, because it is less favourable to the purchaser in two respects: first, the purchase there was made by an actual tenant for life in possession, whereas here it was made by a reversioner; and, secondly, in that case the leases were at one time renewable by custom, whereas here it is not so. Not finding any case in which the doctrine of *Keech* v. *Sandford* (2) has been applied to leaseholds which were not renewable by contract or custom, and finding that the case of *Randall* v. *Russell* (1) has not been overruled, I shall follow it, and I therefore hold that that case applies." I think there has been a slip in taking down the learned judge's judgment. What he meant in his last sentence obviously is: "not finding any case in which the doctrine of *Keech* v. *Sandford* (2) has been applied to the purchase of the reversion of leases which were not renewable," &c. He obviously meant that—the rest of the judgment shews it.

Now even if I thought differently, as I do not, even if I did not agree with that judgment of Stirling J., I should be bound by it. It seems to me, therefore, both on principle and on authority, that the purchase of the reversion in this case did not in the least enure for the benefit of the partnership firm, either on any doctrine based on the consideration of the relations of trustee and cestui que trust, or by regarding William Webb or the purchasers of the other moiety as trustees for the Bevan family. On that ground that part of the case fails.

But I do not want to part with it without saying that I think

(1) 3 Mer. 190; 17 R. R. 56.
(2) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.

it fails on another ground, which is this. In my judgment, even if the reversion could be treated as a graft or an addition to something possessed by the firm, or by the cestuis que trust, there is not in this case anything to which it could be grafted. I need not repeat what I said when I was reading the documents in the case. In my judgment the true effect of those documents was, not to create an interest in the firm in these leasehold premises, but to give them by contract a right to carry on the business. If so, there is nothing to which, even if a renewed lease were granted, it could attach under the equitable doctrines which I have referred to. In my judgment, therefore, on this part of the case, instead of the declaration asked for by the plaintiffs, I think there ought to be a declaration that the fee simple—the freehold and inheritance of the brewery premises—ought not to be treated as part of the assets of the firm.

Solicitors: *Andrew, Wood, Purves & Sutton, for Powell & Hughes, Brynmawr; Le Brasseur & Oakley, for Le Brasseur & Bowen, Newport, Monmouthshire.*

H. C. R.

JOYCE J.

1904

Nov. 17, 18, 22; *Dec.* 20.

BERWICK & CO. *v.* PRICE.

[1903 B. 1889.]

Mortgage—Priority—Notice—Legal Mortgage—Prior Equitable Mortgage—Non-production of Title-deeds—Fraudulent Solicitor—Postponement of Legal Mortgage.

A purchaser who without requiring delivery or production of the title-deeds takes a title from a mortgagee who has deposited the deeds by way of sub-mortgage is affected with constructive notice of the sub-mortgage, and the legal estate conveyed to the purchaser is in his hands subject to the equitable incumbrance, and this notice will raise a trust to the amount of the sub-mortgage. It is immaterial whether the purchaser employs a solicitor or not, and whether the solicitor, if one is employed, informs the purchaser of the sub-mortgage or not.

B. mortgaged two freehold houses to C., a solicitor, for 2100*l.* C. then deposited the mortgage and title-deeds with his bankers to secure the balance of his banking account, which continued to be overdrawn for more than 10,000*l.* until his bankruptcy in 1902. The bank advisedly omitted to give notice of their security to B. Subsequently B. and C. mortgaged one of the houses to H. for 650*l.*, which was paid to C. in partial discharge of the original mortgage debt, and the house was expressed to be discharged from that mortgage; and they mortgaged the other house to W. for 550*l.* on precisely similar terms. B. also gave C. a second mortgage on both houses to secure 900*l.*, the balance remaining due on the original mortgage. In the three last-mentioned mortgages C. acted as solicitor for all parties, none of whom had any actual knowledge of the bank's sub-mortgage. In an action by the bank to enforce their security:—

Held, that H. and W. were affected with constructive notice of the sub-mortgage, and were respectively trustees of the legal estate for the bank; but

Held, that B. was not bound to require production of the title-deeds on paying off part of the original mortgage debt, and,

Semble, that he was not affected with notice of the sub-mortgage and was discharged from liability under the original mortgage to the extent of the two sums of 650*l.* and 550*l.*

THIS action was brought to enforce an equitable mortgage by deposit, and it raised certain questions as to priority of mortgages.

By an indenture dated January 26, 1886, a piece of land situate in Battenhall Road, Worcester, was conveyed by the Worcester Land and Investment Company, Limited, to the defendant William Bennett, a builder, in fee simple.

By an indenture of mortgage dated January 27, 1886, the said piece of land, together with two dwelling-houses erected thereon known respectively as Holmden and Ravendale, were mortgaged by Bennett to Frederick Corbett to secure 2100*l.* and interest.

Corbett, who was a solicitor of Worcester, advanced money to Bennett from time to time to enable him to carry on his building operations, and was at this time the holder from Bennett of mortgages on several other properties in Worcester; and by a deed of March 20, 1886, a receiver was appointed of the rents and profits of these mortgaged properties, including the two houses comprised in the mortgage of January 27, 1886. By this deed it was agreed that the net residue of the rents and profits should be paid by the receiver to Corbett, and should be applied by him, first, in payment of the interest on the mortgages; and, secondly, in payment of his professional charges.

On August 3, 1886, the mortgage of January 27, 1886, together with the deed of conveyance of January 26, 1886, was deposited by Corbett with his bankers, the plaintiffs, to secure the balance of his banking account. This deposit was accompanied by a covering letter to the following effect: "Herewith we send you the deeds relating to the mortgage of Mr. W. Bennett to Mr. Corbett of two houses in Battenhall Road, Worcester, for securing 2100*l.* and interest. Please acknowledge receipt."

At this date Corbett's banking account was overdrawn to the extent of 11,679*l.* 14*s.* 4*d.*, and throughout the transactions hereinafter referred to it continued to be overdrawn to an amount exceeding 10,000*l.* The plaintiffs did not give notice to Bennett of their security until June, 1902.

By an indenture of mortgage dated December 31, 1887, made between Bennett of the first part, Corbett of the second part, and Eliza Eunice Holbrook of the third part, after reciting the mortgage of January 27, 1886, and that Mrs. Holbrook had agreed at Bennett's request to lend him 650*l.* to be secured in manner thereinafter mentioned, and that it had been arranged that the 650*l.* should be paid to Corbett in

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partial discharge of the principal moneys secured to him by the thereinbefore recited mortgage, it was witnessed that, in consideration of the sum of 650*l.* paid to Corbett by Mrs. Holbrook at the request of Bennett, of which sum Corbett and Bennett thereby respectively acknowledged the receipt and payment, Corbett as mortgagee, and Bennett as beneficial owner, conveyed to Mrs. Holbrook the house known as Holmden, being part of the premises comprised in the said recited mortgage, discharged from the principal moneys and interest secured by the said mortgage, for the purpose of securing the repayment of 650*l.* with interest.

By an indenture of mortgage dated January 31, 1891, made between Bennett of the first part, Corbett of the second part, and Anne Wilson of the third part, which was in precisely similar terms to the last-mentioned mortgage, the house known as Ravendale, being the remaining portion of the premises comprised in the original mortgage, was mortgaged to Miss Wilson for 550*l.* and interest, and the house was expressed to be discharged from the principal moneys and interest secured by the original mortgage; and the deed contained an acknowledgment of the right of Miss Wilson to production of the conveyance of January 26, 1886, and the mortgage of January 27, 1886.

By a further indenture of mortgage of the same date, namely, January 31, 1891, Bennett gave to Corbett a second mortgage to secure 900*l.* with interest.

The three sums of 650*l.*, 550*l.*, and 900*l.* made up together the sum of 2100*l.* secured by the mortgage of January 27, 1886. Both the 650*l.* and the 550*l.* were paid into Corbett's account at the plaintiffs' bank in the ordinary course, but the plaintiffs did not know from what source the moneys came.

The mortgage of December 31, 1887, over Holmden ultimately became vested in the defendants Mr. and Mrs. W. H. Price.

The mortgage of January 31, 1891, over Ravendale was transferred first by a deed dated July 31, 1896, to Miss Elizabeth Wilson, and afterwards by a deed dated December 5, 1898, to the defendant Spicer.

In 1902 Corbett was convicted of misapplying his clients' moneys and was adjudicated bankrupt.

On May 5, 1903, the plaintiffs commenced this action against Mr. and Mrs. Price, Spicer, Corbett's trustee in bankruptcy, and Bennett; but the defendants Mr. and Mrs. Price having entered into a compromise with the plaintiffs and transferred their mortgage to them, the action was discontinued as against them. The plaintiffs claimed as against the remaining defendants that their sub-mortgage of August 3, 1886, might be enforced by foreclosure, and that it might be declared that their security took priority over any claim of the defendant Spicer.

The defendants put in separate defences whereby they respectively denied that they had any actual or constructive notice of the plaintiffs' sub-mortgage, and alleged that the debt of 2100*l.* due on the mortgage of January 27, 1886, was discharged and the security satisfied by the three mortgages for 650*l.*, 550*l.*, and 900*l.*, and they also pleaded the Statute of Limitations; and the defendant Spicer counter-claimed for a declaration that the mortgage of January 31, 1891, to Anne Wilson was a first charge on the premises therein comprised, and that it might be enforced by foreclosure or sale.

The trustee in bankruptcy of Corbett did not appear at the trial of the action.

At the trial it was admitted that Corbett acted as solicitor for Bennett, Mrs. Holbrook, Miss Anne Wilson, Miss Elizabeth Wilson, and Spicer in the several transactions to which they were respectively parties, and settled the mortgages to Mrs. Holbrook and Miss Wilson; and it was further admitted that none of the persons for whom he acted in these transactions had any actual knowledge of the plaintiffs' sub-mortgage.

No interest was ever paid by Bennett in respect either of the mortgage of January 27, 1886, or of the mortgage of December 31, 1887, or of the two mortgages of January 31, 1891; but under the provisions of the receivership deed of March 20, 1886, the receiver paid the net rents and profits to Corbett until his bankruptcy, and Corbett debited Bennett with interest on Mrs. Holbrook's and Miss Wilson's mortgages, but not on the mortgage of January 31, 1891, by Bennett to himself.

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No interest was ever paid by Corbett to the plaintiffs in respect of the sub-mortgage, but he was debited by the plaintiffs half-yearly with interest and bank charges.

Levett, K.C., and *Martelli*, for the plaintiffs. 1. The defendants and their predecessors in title are affected with notice of the sub-mortgage by reason of employing Corbett as their solicitor.

2. They have been guilty of such negligence that their securities ought to be postponed.

3. The defendant Bennett is equally affected with notice of the sub-mortgage, and cannot get the benefit of the payments which he has made.

Where a solicitor acts for all parties, they all have notice of a deed which it was his duty to produce even though it was his interest to conceal it. *Kennedy* v. *Green* (1) is distinguishable from the present case on the ground stated by Turner L.J. in *Atterbury* v. *Wallis* (2), which is indorsed by Lord Hatherley L.C. in *Rolland* v. *Hart* (3), namely, that in that case there was fraud on the part of the solicitor independently of the concealment; but here the only fraud of Corbett was the concealment of the sub-mortgage, and if Bennett and Miss Anne Wilson had employed an honest solicitor the sub-mortgage would have come to their knowledge: see Cordery on Solicitors, 3rd ed. p. 408.

Where parties deal with property without getting production of the title-deeds or a reasonable excuse for their non-production, although they get a legal mortgage, yet it is postponed to a prior equitable mortgage: *Worthington* v. *Morgan* (4); *Hewitt* v. *Loosemore* (5); *Atterbury* v. *Wallis* (6); *Lloyd's Banking Co.* v. *Jones* (7); *Oliver* v. *Hinton*. (8)

Hughes, K.C., and *Gatey*, for the defendant Spicer. 1. Bennett, having no notice of the sub-mortgage, could settle with Corbett on any terms he thought fit: *Matthews* v.

(1) (1834) 3 My. & K. 699; 41 R. R. 176.
(2) 8 D. M. & G. 454, 466.
(3) (1871) L. R. 6 Ch. 678, 682.
(4) (1849) 16 Sim. 547, 551.
(5) (1851) 9 Hare, 449, 458.
(6) (1856) 2 Jur. (N.S.) 343. 8 D. M. & G. 454, 464.
(7) (1885) 29 Ch. D. 221.
(8) [1899] 2 Ch. 264.

Wallwyn (1); *Williams* v. *Sorrell* (2); *Norrish* v. *Marshall* (3); *Stocks* v. *Dobson*. (4) This he did by substituting the three mortgages for 650*l*., 550*l*., and 900*l*. for the original mortgage. That was a good discharge of the original debt by accord and satisfaction, and, the original mortgage debt having ceased to exist, there is nothing for the sub-mortgage to operate on: *Roxburghe* v. *Cox*. (5) Even if Bennett was guilty of negligence in paying off the mortgage debt without requiring the delivery of the mortgage deed, the bank cannot avail themselves of that, since they were themselves guilty of greater negligence in not giving notice of their sub-mortgage to Bennett: *In re Lord Southampton's Estate*. (6)

2. A legal mortgage is not postponed to an equitable mortgage except by negligence so gross as to lead to the presumption of fraud: *Northern Counties of England Fire Insurance Co.* v. *Whipp*. (7)

3. Notice will not be imputed where it is impossible to suppose that the facts known to the solicitor were made known to his client: *Cave* v. *Cave* (8); *Waldy* v. *Gray*. (9) The tendency of modern times is to restrict the doctrine of constructive notice, and this tendency has been recognised by the Legislature: see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.

4. The plaintiffs' claim is barred by the Real Property Limitation Act, 1874, s. 8. This is an action to enforce a charge more than twelve years old, no interest having been paid in the meantime, for there has been nothing which can be identified as a payment of interest by either Bennett or Corbett. Payment of rent is not equivalent to payment of interest within the meaning of the statute: *Harlock* v. *Ashberry*. (10)

Bovill, for the defendant Bennett. Bennett was not guilty of negligence and was not affected with notice of the sub-mortgage. He was not bound to demand production of the

(1) (1798) 4 Ves. 118.
(2) (1799) 4 Ves. 389; 53 R. R. 11.
(3) (1821) 5 Madd. 475; 53 R. R. 36.
(4) (1853) 4 D. M. & G. 11.
(5) (1881) 17 Ch. D. 520.
(6) (1880) 16 Ch. D. 178, 186.
(7) (1884) 26 Ch. D. 482.
(8) (1880) 15 Ch. D. 639, 643.
(9) (1875) L. R. 20 Eq. 238, 251.
(10) (1882) 19 Ch. D. 539.

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mortgage on paying off a part only of the mortgage debt, and in the absence of notice or negligence he ought not to be compelled to pay the debt twice over.

Levett, K.C., in reply. I claim priority for the whole of the 2100*l.* Bennett and Miss Wilson stand in the same position as to notice. They both had notice through Corbett, and that fact takes the case out of the principle of *Matthews* v. *Wallwyn* (1) and other cases of that kind. *Northern Counties of England Fire Insurance Co.* v. *Whipp* (2) does not apply, because in that case the legal mortgage was prior in date to the equitable mortgage, and the Court was not dealing with a case like the present: see *Oliver* v. *Hinton.* (3)

As regards the Statute of Limitations, there was payment of interest by both Bennett and Corbett. *Harlock* v. *Ashberry* (4) does not apply because the receiver was Bennett's agent, and payments by the receiver to Corbett were payments by Bennett on account of interest. This is shewn by the terms of the receivership deed.

Cur. adv. vult.

1904. Dec. 20. JOYCE J. This case is one of considerable complication, and, as it seems to me, by no means free from difficulty.

It is well settled that a purchaser (in which term I must be understood to include a mortgagee or a transferee of a mortgage) of land will be deemed to have notice of all facts, which he would have learned upon a proper investigation of the title, under a contract containing no restriction of his rights in that respect. So, a purchaser who does not ask to have the title-deeds delivered—*Worthington* v. *Morgan* (5), *Maxfield* v. *Burton* (6), and *Lloyd's Banking Co.* v. *Jones* (7)—or, if they also relate to other property, to have them produced—*Oliver* v. *Hinton* (3)—is deemed to have notice if they turn out to be in the possession of a stranger and of that stranger's rights whatever they may be. Therefore a purchaser, who, without

(1) 4 Ves. 118.
(2) 26 Ch. D. 482.
(3) [1899] 2 Ch. 264, 270.
(4) 19 Ch. D. 539.
(5) 16 Sim. 547.
(6) (1873) L. R. 17 Eq. 15.
(7) 29 Ch. D. 221.

requiring delivery or production of the title-deeds, takes a title from a mortgagee who has deposited the deeds by way of sub-mortgage, is affected with constructive notice of such sub-mortgage, and the legal estate, whatever it may be, conveyed to the purchaser is in his hands subject to the equitable incumbrance, and this notice of the sub-mortgage will raise in such purchaser a trust to the amount of the sub-mortgage: Story's Equity Jurisprudence, s. 395.

It is quite immaterial whether the purchaser employs a solicitor or not: see per Romilly M.R. in *Atterbury* v. *Wallis* (1); *Oliver* v. *Hinton*. (2) So also it is immaterial whether the solicitor, if one be employed, does or does not in fact inform his client of the existence of the incumbrance, namely, the sub-mortgage: see per Lord Hatherley in *Rolland* v. *Hart*. (3) Evidence will not be admitted to prove that a solicitor did not in fact communicate his knowledge to the client: *Bradley* v. *Riches* (4); *Kettlewell* v. *Watson* (5); and see per Kindersley V.-C. in *Boursot* v. *Savage*. (6)

A person who ought, according to the rule of Courts of Equity, either personally or by his agent to have known a fact is treated in equity as if he actually knew it, and he cannot escape the consequences of this constructive notice by employing the dishonest solicitor of the other party with whom he is dealing, if the true facts would have come, or ought to have come, to the knowledge of an independent solicitor in case such a solicitor had been employed. No one by delegating to an agent to do what he might do himself can place himself in a better position than if he did the thing himself. If notice to the agent were not notice to the principal, notice would be avoided in every case by employing agents: per Lord Northington L.C. in *Sheldon* v. *Cox*. (7)

Sect. 3 of the Conveyancing Act, 1882, imposes certain restrictions upon the old rules as to constructive or imputed notice, but it in no way alters the law with respect to notice

(1) 2 Jur. (N.S.) 343, 344.
(2) [1899] 2 Ch. 264.
(3) L. R. 6 Ch. 678, 681–2.
(4) (1878) 9 Ch. D. 189.
(5) (1882) 21 Ch. D. 685, 704–7.
(6) (1866) L. R. 2 Eq. 134, 142.
(7) (1764) 2 Eden, 224, 228.

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of any instrument, fact, or thing that would have come to the knowledge of the purchaser if such inquiries and inspections had been made as ought reasonably to have been made by him.

If I honestly buy or advance money upon mortgage of an estate without notice of an incumbrance, but the solicitor whom I employ in the transaction knew or ought to have known of it, I am held to have notice of such incumbrance, although notice will not be imputed to me of a fraud previously perpetrated by the solicitor and therefore within his knowledge, unless the fraud be such as ought to have been discovered by any honest and competent solicitor who duly investigated the title on my behalf; but, if it be such a fraud, then I have constructive notice of it: *Kennedy* v. *Green*. (1)

The omission by a purchaser to investigate the title or to require delivery or production of the title-deeds is not to my mind either fraudulent or culpable, nor does it, since the judgment of Lindley M.R. in *Oliver* v. *Hinton* (2), seem necessary to characterize it by any such epithet; but the consequence of such omission or wilful ignorance is that it is held to be unjust to prefer the purchaser to the previous mortgagee who has the deeds, although such mortgage be equitable and the purchaser have the legal estate.

In the present case, however, the deposit by Corbett with the bankers of the conveyance of January 26, 1886, and the mortgage to Corbett of January 27, 1886, was not a fraud. Any ordinary solicitor who, on behalf of Mrs. Holbrook as intending mortgagee of Holmden, or on behalf of Miss Wilson as intending mortgagee of Ravendale, investigated the title to the property proposed to be mortgaged must or ought to have discovered the existence of the sub-mortgage. At all events, if he did not, or if no solicitor were employed at all, Mrs. Holbrook and Miss Wilson respectively would have constructive notice of the sub-mortgage.

There is nothing in *Kennedy* v. *Green* (1) when examined and understood, or, so far as I am aware, in any other decided case, to support the contention that Mrs. Holbrook or Miss

(1) 3 My. & K. 699; 41 R. R. 176. (2) [1899] 2 Ch. 264, 273.

Wilson can be relieved from the effect of the rule of the Court with respect to constructive notice by the fact that she employed Corbett as her solicitor, even if it were granted that he had an interest in not disclosing or in concealing the sub-mortgage. Indeed, the contrary is shewn by the actual decision of the Lord Chancellor in *Kennedy* v. *Green* (1), and by *Atterbury* v. *Wallis*. (2) *Hopgood* v. *Ernest* (3); *Rolland* v. *Hart* (4), which are directly in point. In other words, the mere fact that a prior equitable title, which ought to have been discovered by an ordinary independent solicitor, was concealed from the principal by the solicitor employed does not prevent the principal from being affected with constructive notice of it; and I must hold that Mrs. Holbrook and Miss Wilson were each affected with constructive notice of the sub-mortgage to the bankers. It is not necessary to impute to them the knowledge that their solicitor Corbett undoubtedly possessed of the existence of the sub-mortgage he himself had made. The result would be just the same if they had not employed Corbett or any solicitor at all.

By the same rule each of the transferees from Mrs. Holbrook and Miss Wilson—and therefore the defendant Spicer—had similar constructive notice of the sub-mortgage: not because they employed Corbett as their solicitor, but notwithstanding such employment.

As between the plaintiffs, the bankers, then, and the defendant Spicer, the plaintiffs have priority. This defendant, to the extent of what he acquired by the transfer to him of Miss Wilson's mortgage, is bound in the same manner as Miss Wilson was, and primâ facie he is constructively a trustee for the bankers who hold the sub-mortgage to the amount required to satisfy their security.

It was contended on behalf of the defendant Spicer, and also, I think, of the defendant Bennett, the mortgagor, that the mortgages to Mrs. Holbrook and Miss Wilson were given in substitution for and effected a partial discharge of the original mortgage to Corbett of January 27, 1886, and that

(1) 3 My. & K. 699; 41 R. R. 176.
(2) 8 D. M. & G. 454.
(3) (1865) 3 D. J. & S. 116.
(4) L. R. 6 Ch. 678.

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consequently the security of the mortgage was thereby diminished to the extent of 650*l.* and 550*l.*, if not altogether extinguished. Of course if Bennett, prior to or at the time of these mortgages being made, had notice actual or constructive of the sub-mortgage, then these mortgages to Mrs. Holbrook and Miss Wilson, who, as I have already held, had constructive notice of the sub-mortgage, are as against the bankers wholly ineffectual, and no better than waste paper, and the claim of the bankers is precisely the same as if the original mortgage of January 27, 1886, were still subsisting in every respect. It was said, however, that if Bennett had not notice of the sub-mortgage, then the original mortgage was discharged, and further that the sub-mortgage, having nothing left to operate upon, expired with it. I am unable to assent to this proposition. Mrs. Holbrook and Miss Wilson having notice of the sub-mortgage, there could be no discharge, partial or otherwise, of the original mortgage for their benefit to the prejudice of the bankers without the concurrence of the bankers. If, however, Bennett had no notice of the sub-mortgage, he is or may be entitled to say that as against him the original mortgage is discharged to the extent of the 650*l.* raised from Mrs. Holbrook and the 550*l.* raised from Miss Wilson, and that they or the persons entitled through them have respectively first mortgages for those amounts upon Holmden and Ravendale respectively, that subject thereto Corbett has a charge for the balance of 900*l.* upon the equities of redemption in Holmden and Ravendale, and that these are the only charges upon the property as against him. He could not successfully contend for more than this; and, as I have already said, whatever Mrs. Holbrook or Miss Wilson obtained under the mortgages to them is in my opinion, as between them and the bankers, subject in equity to a trust for the bankers to the extent required to satisfy the full amount of their security.

Further, in my opinion, no Statute of Limitations affords to the defendant Spicer any defence against the claim of the bankers. Interest on the sub-mortgage has been regularly paid or acknowledged by Corbett, and the rents received by Bennett's agents have by his direction been applied in paying

the interest on the subsisting incumbrances, the legal effect being the same as if he had personally paid such interest from time to time.

Having regard to the values of Holmden and Ravendale, it is in all probability practically immaterial whether Bennett had or had not notice of the sub-mortgage. I may say, however, that as at present advised I do not see my way to hold that he had, or is to be deemed to have had, such notice, although it has been admitted that Corbett acted as his solicitor in the several transactions "relating to or in which he was or purported to be interested as mentioned in the pleadings."

The plaintiffs the bankers, as they admit, abstained, and no doubt advisedly, from giving notice to Bennett of their sub-mortgage, choosing to run all the risk of not doing so until the month of June, 1902, so that Bennett would be entitled to set off against any claim of the bankers upon him or his property all moneys paid by him to Corbett towards the discharge of the original mortgage before he had notice of the sub-mortgage, and the bankers would be affected or bound by all bonâ fide transactions in reference to the mortgage that may have taken place between Bennett, the mortgagor, and Corbett, the mortgagee, subsequently to the mortgage and previous to such notice: see *Stocks* v. *Dobson* (1), and per Fry L.J. in *Bickerton* v. *Walker*. (2)

Now, Bennett had not express notice by reason of the deliberate omission of the bankers, who elected not to give it. There was no evidence before me to shew, nor do I think it was contended, that Bennett constituted Corbett his general agent to obtain the advances from Mrs. Holbrook or from Miss Wilson, or that Bennett had placed himself in the hands of Corbett, signing whatever he was asked to sign, so as, according to the decision of the Court of Appeal in *Dixon* v. *Winch* (3), to render himself responsible to Mrs. Holbrook or Miss Wilson for whatever Corbett did or failed to do in dealing with her. I infer that Corbett for his own purposes obtained the advances

(1) 4 D. M. & G. 11.
(2) (1885) 31 Ch. D. 151, 158.
(3) [1900] 1 Ch. 736.

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from Mrs. Holbrook and Miss Wilson respectively and requested Bennett to concur, acting as his solicitor to the extent of settling the deed on his behalf. It does not appear to me that Bennett, being without notice of the sub-mortgage, was bound, before or upon paying off any part of his mortgage debt to Corbett, or executing at Corbett's request the mortgages to Mrs. Holbrook and Miss Wilson, to require production of the original mortgage deed of January 27, 1886, of the existence of which he was, of course, well aware: see per Turner L.J. in *Stocks* v. *Dobson*. (1) In other words, I do not think he had constructive notice of the sub-mortgage; and, if that be so, I do not think that knowledge thereof is to be imputed to him through Corbett, who for his own ends was committing a fraud upon the bankers, although the money raised was paid to his account with the bankers, but without their being informed of the source from whence it had arisen. At all events, I think that, under all the circumstances as between Bennett and the bankers, such notice ought not to be imputed, seeing that the bankers for their own purposes refrained from giving Bennett the usual notice of their sub-mortgage, an omission which has caused all the trouble so far as Bennett is concerned. In my opinion it would, under the circumstances, be unjust and wrong to say that as between the bankers and Bennett the latter must be deemed to have notice of the sub-mortgage when he had no such notice in fact by reason of the bankers advisedly omitting to give it.

Now, what is the practical result, upon the hypothesis that Mrs. Holbrook and Miss Wilson and their respective transferees must be taken to have had notice of the sub-mortgage, supposing that Bennett had no notice thereof? This precise question has scarcely been argued before me, and I am willing, if any of the parties desire it, to hear further argument upon it. At the same time in this action, having regard to the probable insufficiency in value of the property comprised in the original mortgage, I am not sure that it is of any practical importance whether Bennett had notice or not. Even if he had not notice, I take it that the bankers come first upon the

(1) 4 D. M. & G. 11, 17.

property comprised in Mrs. Holbrook's mortgage to the extent of the principal 650*l.*, and all interest owing in respect thereof (I am omitting from consideration for the present the fact that they have bought up the equity of redemption in Holmden); and in like manner come first upon the property in Miss Wilson's mortgage for the principal 550*l.*, and any interest owing in respect thereof; and that for the 900*l.* balance of the original mortgage money and any interest in respect thereof the bankers have a charge upon the equities of redemption of the properties comprised in the two last-mentioned mortgages. I do not suppose that anything can be left for any one else.

Solicitors: *Maples, Teesdale & Co., for Lord & Parker, Worcester; Ford & Ford, for W. W. A. Tree, Worcester; H. A. Farman, for C. W. F. Clinton, Worcester.*

H. B. H.

C. A.
1904
FARWELL J.
Nov. 23.
C. A.
1905
March 27, 28.

LONGMAN *v.* BATH ELECTRIC TRAMWAYS, LIMITED.

[1904 L. 1430.]

Company—Stock Exchange—Shares—Certificate of Shares—Negotiable Instrument—Title, Primâ facie Evidence of—Companies Act, 1862 (25 & 26 *Vict. c.* 89), s. 31—*Transfer—Certification—Return of Certificate to Transferor—Mistake by Company's Secretary—Fraud of Transferor—Second Transferee—Loss, Proximate Cause of—Safe Custody of Documents of Title—Duty to the Public—Negligence—Liability of Company—Duty of Company towards Third Parties—Alteration of Position induced by Conduct—Estoppel—Secretary—Receipt—Authority to bind Company.*

If a company, having a certificate of shares in its possession, certificates a transfer of those shares to a proposing transferee, no duty is thrown on the company, with regard to the custody of the certificate, towards any person other than the proposing transferee, or any person claiming through him.

A share certificate is, under s. 31 of the Companies Act, 1862, primâ facie evidence only of the title of the registered holder of the shares specified therein: it is not a negotiable instrument, nor is it a warranty of title on the part of the company issuing it. If the company, having had a certificate lodged with it together with the transfer for certification, subsequently returns the certificate to the transferor in error (for instance, by a mistake on the part of the secretary), and so enables the transferor fraudulently to deal afresh with the shares comprised therein and to obtain an advance thereon from a person ignorant of the circumstances under which the certificate had come to the hands of the transferor, that person cannot maintain against the company an action to recover the loss sustained by the fraud of the transferor on the ground that the company was bound to have retained the certificate when lodged; for the company owes no duty of safe custody to the public at large.

To entitle a plaintiff to recover from a defendant, on the ground of estoppel, a loss occasioned through culpable neglect on the part of the defendant, the plaintiff must prove that the negligence complained of occurred in the particular transaction in which his loss arose, and also that such negligence was the proximate, direct, or real cause of the loss.

The secretary of a company does not, when giving a transferee of shares the usual receipt for the transfer upon its being lodged for registration, thereby bind the company either to recognise the transferee's title to the shares or to issue the corresponding share certificate.

Decision of Farwell J. affirmed.

THE defendant company, the Bath Electric Tramways, Limited, was incorporated under the Companies Acts with a nominal capital consisting partly of preferred ordinary shares

of 1*l.* each, and under articles of association including the following :—

"36. Subject to the restrictions of these presents any member may transfer all or any of his shares, but every transfer must be left at the office of the company accompanied by the certificate of the shares to be transferred and such other evidence (if any) as the directors may require to prove the title of the intending transferor.

"37. The instrument of transfer of a share shall be in writing in the usual common form of transfer, and shall be executed both by the transferor and the transferee, and the transferor shall be deemed to remain the holder of the shares until the name of the transferee is entered in the register of members in respect thereof."

On April 19, 1904, one Peter Bennett, a stockbroker, became the registered owner of 1500 preferred ordinary shares of 1*l.* each, fully paid, in the defendant company, and on the same day two certificates, one for 500 shares and the other for 1000, were duly made out in his name but not sent to him. Each certificate was dated April 19, 1904, was under the company's seal and was in the usual form, stating that Bennett was "the registered holder" of the specified shares, "subject to the memorandum and articles of association." At the foot of each certificate was the usual "Note.—No transfer of any portion of the shares comprised in this certificate will be registered until the certificate has been delivered at the company's office." On the same day there was presented to the secretary of the company a transfer for value, in the usual form, by Bennett of the 1500 shares to two persons named Houselander and Madders, who had not executed the transfer at that time. It was so presented for the purpose of obtaining what is called on the Stock Exchange a "certification," and thereupon the following certification, which was partly in a printed form, was given on the margin of the transfer :—

"Certificate forwarded to the company's office by, for, and on behalf of the Bath Electric Tramways, Limited.

"(Signed) H. J. Almond,

"Secy. 19–4–1904."

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On April 22, 1904, the secretary, by mistake, sent to Bennett the two certificates standing in his name, and he signed the customary counterfoil receipt for them. On the mistake being discovered, which was about the end of April, application was made to Bennett to return the certificates, which he promised to do but never did.

On April 28, 1904, Messrs. Houselander and Madders returned their transfer, now duly executed by them, to the company's secretary to be registered, which was done, so that they became the registered holders of the 1500 shares. Bennett being, as above stated, in possession of the certificates for the 1500 shares, deposited with the plaintiffs, as security for advances, the certificate for 500 of the shares on April 25, 1904, and the certificate for the other 1000 shares on May 3, 1904, and as further security he executed to them two transfers of the shares, one dated respectively April 25, and the other May 11, 1904. The plaintiffs were at the time unaware of the previous transfer to Messrs. Houselander and Madders, or of its having been lodged with the company for certification.

On May 11 and 12, 1904, the plaintiffs lodged the two transfers to them at the company's office for registration, accompanied by the certificates, whereupon the company's secretary handed to them formal printed receipts of those dates for the two transfers. Each receipt was headed as from the company's office and was signed by the "secretary," and it acknowledged that the particular transfer had been received "for registration," and also that a fee of 2*s.* 6*d.* had been paid. At the foot were the words: "This receipt must be returned to the company's office as above in exchange for the relative share certificate which will be ready on 8th prox."

The plaintiffs in due course tendered to the company the receipts for the transfers and requested delivery of new certificates in exchange, whereupon the secretary informed them that the shares the subject of the transfers had been previously transferred by Bennett, and that consequently the company could not issue certificates to the plaintiffs or register the shares in their names.

Shortly after the transfers to them, and before receiving the

information last mentioned, the plaintiffs sold 250 of the shares, but ultimately finding themselves unable, in the absence of the certificates, to transfer those shares to the purchasers, the plaintiffs had to purchase other shares for delivery in lieu thereof, and thereby sustained, as they alleged, damage to the amount of 27*l.* 2*s.* 8*d.*

In consequence of their inability to obtain registration of the 1500 shares or delivery of the corresponding certificates, the plaintiffs brought this action against the company, alleging in their statement of claim (as the fact was) that the transfers to them of the shares and the delivery to them by Bennett of the certificates had been made and taken by them in good faith and without notice or knowledge of any fact or circumstance which would invalidate or affect Bennett's title to the shares. They also alleged the special damage to the amount of 27*l.* 2*s.* 8*d.* in consequence of their having been unable to make a title to the 250 shares sold.

They accordingly claimed registration by the company of the transfers for the 1500 shares and delivery of certificates for those shares, and damages for the default of the company in registering the transfers and delivering the certificates; and if from any cause whatever the company should be unable now to register the transfers and to deliver the certificates, then further damages to the amount of the value of the shares.

In its statement of defence the company admitted that the secretary by mistake and in forgetfulness of the transfer to Messrs. Houselander and Madders sent the certificates to Bennett, and this mistake was in fact admitted by the secretary in giving his evidence at the trial.

The action was tried on oral evidence before Farwell J. on November 23, 1904.

Bramwell Davis, K.C., and *Dauney*, for the plaintiffs.
Upjohn, K.C., and *Sargant*, for the defendant company.

FARWELL J., after shortly stating the facts, continued:— Then, on May 11 and 12, 1904, the two transfers to the plaintiffs were lodged with the company. Down to this point I

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have simply this—that Bennett has been apparently a rascal and has transferred the same shares to two different sets of people. The prior title is, of course, in Messrs. Houselander and Madders who got the first transfer; the plaintiffs have not attempted to attack the title of these gentlemen, and the company were bound to register them as the owners of the shares. The certificates were sent to Bennett, and, instead of being honestly used by him by being handed to Messrs. Houselander and Madders, or sent to the company in order to complete their registration, were used by him in order to obtain an advance of money from the plaintiffs. That is Bennett's roguery and has nothing to do with the company. What is suggested is that the company were guilty of a dereliction of duty in sending the certificates to Bennett on April 22, and that they thereby had estopped themselves from denying that Bennett was and continued to be the owner of these shares. I have heard no argument and I am aware of no authority that would justify me in so holding. I can see no answer to Bennett's claim on April 22 to have the share certificates if he wished for them: the articles give them to him; the mere certification of the transfer to Messrs. Houselander and Madders could not prevent Bennett's claim to have his own certificates. The transfer might never have gone through, as in fact was the case with certain former transfers by Bennett. It may be of the utmost importance to a man who, having a certificate of shares of which he is the registered holder, has contracted to sell the shares to A. B., on finding A. B. cannot complete, that he should have the money at once, and he, therefore, uses the certificate to obtain the money. In such a case is it to be said that the company are obliged to hold the certificate of the transferor and make inquiries from the person to whom they have certificated? Are they to keep a register of the names of the persons to whom they certificate? It seems to me it would be imposing a burden on the company beyond anything to be found in the Companies Acts or in the articles of association of the company. In the present case the company owed to the plaintiffs no duty in respect of these

certificates. There is no untruth in the certificates: Bennett was, on April 19 and also on April 22, the duly registered owner of these shares, and nobody else had any interest or claim in or to them. The result is that the action entirely fails, and must be dismissed with costs.

The plaintiffs appealed.

The appeal was heard on March 27 and 28, 1905.

Bramwell Davis, K.C., and *Ashton Cross*, for the plaintiffs. It is submitted that, by reason of the negligent act of their secretary, in sending the certificates of the shares to Bennett after the transfer executed by him to Houselander and Madders had been "certificated," the company are estopped from denying that at the time when Bennett deposited the certificates with the plaintiffs he was the true owner of the shares. It is true that the certification does not amount to a warranty of the title of the person who has deposited the certificates with the company: *Bishop* v. *Balkis Consolidated Co.* (1) But it is contended that the company, when they had the certificates in their possession and had "certificated" the transfer to Houselander and Madders, owed a duty to every one who might desire to become shareholders in the company, i.e., to the public, or to a section of the public, and are liable for a breach of that duty on the ground of estoppel by negligence. It was their duty to take care that the certificates were not handed over to the wrong person; whereas by their negligence they enabled Bennett to go to the plaintiffs, or any one else, and borrow money on the faith that he (Bennett) was the owner of the shares. There may be estoppel by negligence without fraud, if the negligent person owes a duty to the person who has suffered loss: *Coventry, Sheppard & Co.* v. *Great Eastern Ry. Co.* (2); *Carr* v. *London and North Western Ry. Co.* (3); *Seton, Laing & Co.* v. *Lafone* (4); *Swan* v. *North British Australasian Co.* (5) The negligence of the

(1) (1890) 25 Q. B. D. 512.
(2) (1883) 11 Q. B. D. 776.
(3) (1875) L. R. 10 C. P. 307, 318.
(4) (1887) 19 Q. B. D. 68.
(5) (1863) 2 H. & C. 175.

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defendants' secretary was the proximate cause of the plaintiffs' loss. It would be impossible to carry out transactions on the Stock Exchange if a "certification" cannot be relied upon as shewing that the certificates to which it refers will not be parted with by the company. No doubt, an innocent misrepresentation is not of itself a cause of action, but, if it is coupled with a duty, a cause of action arises on the ground of estoppel. As to estoppel by certificates of shares issued by a company, see *Balkis Consolidated Co.* v. *Tomkinson* (1); and as to the effect of certification, see *George Whitechurch, Ld.* v. *Cavanagh.* (2) When the certificates had been lodged with the company they became stakeholders, and were equally responsible to both parties not to part with them. If this were not so, a transfer of shares could never be safely carried through without a formal investigation of title as in the case of a sale of land. No doubt, the registered owner of shares is generally entitled to have the certificates of the shares; but when by his own act he has put it out of his power honestly to deal with the shares he is not entitled to have the certificates. And in the present case the company have admitted that the certificates were sent to Bennett by mistake. After the certification of a transfer the return of the certificates to the transferor is equivalent to the issue of a second certificate for the shares.

[They also referred to *Dixon* v. *Kennaway & Co.* (3)]

Upjohn, K.C., and *Sargant*, for the defendants. Dealing, first, with the plaintiffs' contention that the company are liable for the negligent act of their secretary, in issuing in effect, it was said, a second certificate to Bennett, that is a proposition which is not supported by authority. On the contrary, it is now settled that a secretary is a mere servant, and that he has no authority to bind the company at all: *George Whitechurch, Ld.* v. *Cavanagh.* (4) Then, with regard to the contention that it was the duty of the company, after having certificated the transfer to Houselander and Madders, to have retained the certificates, it is submitted,

(1) [1893] A. C. 396, 412.
(2) [1902] A. C. 117.
(3) [1900] 1 Ch. 833.
(4) [1902] A. C. 124.

first, that when a company have "certificated" a transfer of shares, there is nothing wrong in their not retaining possession of the certificates until that transfer has been completed. There is nothing wrong in allowing the intending transferor to have possession of the certificates. Secondly, even if the company do wrong in parting with the certificates, they incur no liability to any one except the proposed transferee. No doubt, the company ought not to "certificate" a transfer without production to them of the certificates. But production is sufficient: it is not necessary to leave the certificates with the company until the transfer is passed for registration. The object of "certification" is, no doubt, to facilitate the transaction of business. In *Bishop* v. *Balkis Consolidated Co.* (1) no certificate was produced when the transfer was "certificated." If it is the duty of the company to retain the certificates, to whom is the duty owed, and for how long does it continue? It is submitted that the duty is owed only to the intended transferee and persons claiming through him. The certificated transfer is only inchoate, and there must be some limit of time to the duty, and to the restriction of the right of the transferor to have possession of the certificates. The intended transferee might make default in carrying out his contract, and the transferor might be entitled to rescind. It is submitted that the "certification" is intended for the protection of the transferee who is named in the "certificated" transfer, and it is only he and persons claiming through him who are entitled to complain if the statement is untrue. The company are under no liability to strangers to the transaction. The certificates deposited with the plaintiffs represented Bennett as the legal owner of the shares, and the company had no reason to suppose that he was committing a fraud. The proposition as to estoppel stated in *Carr* v. *London and North Western Ry. Co.* (2) is limited to negligence "in the transaction itself which is in dispute."

The question is, What were the circumstances on April 22, when the secretary sent the certificates to Bennett? Bennett was at that time the legal owner of the shares, for the transfer

(1) 25 Q. B. D. 512. (2) L. R. 10 C. P. 318.

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to Houselander and Madders had not then been executed by them, nor had it been registered. The statement in the certificates that Bennett was the registered owner of the shares was an absolutely true statement, which distinguishes this case from *Coventry, Sheppard & Co.* v. *Great Eastern Ry. Co.* (1) The actual position was that the certificates were sent to the person who was the owner of the shares, subject only to a contract for sale of which the company were not aware until April 28, when the transfer, duly executed by the transferees, was sent to the company's office for registration. It has been suggested that a share certificate is a representation by the company to the world in general that the person named therein has a good title to the specified shares, but there is no instance to be found in the books in support of such a proposition. In the first place, by s. 31 of the Companies Act, 1862 (25 & 26 Vict. c. 89), a share certificate is only "primâ facie evidence of the title" to the specified shares—that is all; and that primâ facie title may turn out to have been superseded by a higher and better title. And further, treating the certificate as a document of title, it is subject to the general law as to the custody of title-deeds, and it has been held by the Court of Appeal in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (2) that a person having the possession or control of title-deeds is not under any general duty of safe custody. Here the company owed no duty towards any person with whom Bennett, the registered holder of the shares and the custodian of the certificates, had subsequent dealings. To hold that a transaction between a company's secretary and a particular person can impose a duty on the company towards a third person would be to place a company in a novel position; it would be straining a transaction beyond the original intention of the parties to it, and would be beyond all reason. How can it be said that the plaintiffs or any one else got any benefit by the company's act of certifying the transfer to Messrs. Houselander and Madders, so that by that act a duty was imposed upon the company towards the plaintiffs and towards that indefinite body, the public? Such a contention

(1) 11 Q. B. D. 776. (2) (1884) 26 Ch. D. 482, 493.

is extravagant. *Bank of Ireland* v. *Trustees of Evans' Charities* (1) shews that there is no such duty towards so vague a body as that described as a section of the public: to establish the existence of any such duty, there must be definite persons. That case, in which the opinion of the judges, delivered by Parke B., was adopted by the House of Lords, decided (2) that negligence, to entitle a plaintiff to relief, must be negligence in or immediately connected with the transaction itself: it must be the proximate cause of the plaintiff's loss. So in *Young* v. *Grote* (3), referred to by Parke B. That agrees with *Swan* v. *North British Australasian Co.* (4) Now, here, the real cause of the loss to the plaintiffs was not the sending of the certificates to Bennett, the registered owner of the shares, which was a natural thing to do: the real cause of the loss was Bennett's dishonesty: the case is precisely similar to *Bank of Ireland* v. *Trustees of Evans' Charities.* (1) Had it not been for Bennett's dishonesty there would have been no loss to anybody. Therefore, on the part of the company there was no negligence for which they are answerable to the plaintiffs. In short, it is clear from *Swan* v. *North British Australasian Co.* (5) and *Bank of Ireland* v. *Trustees of Evans' Charities* (1) that for the plaintiff to establish his claim to relief by estoppel from negligence, it is not enough to shew negligence: it must be negligence in the particular transaction. We do not dispute that there may be estoppel by conduct, if the conduct is such as to induce a person to act upon it: *Carr* v. *London and North Western Ry. Co.* (6); *Pickard* v. *Sears* (7); *Freeman* v. *Cooke* (8); but the point here is that the plaintiffs acted upon the certificates which Bennett deposited with them, and upon nothing else; and the statement in them which induced the plaintiffs to act was perfectly true, namely, that Bennett was the registered holder of the specified shares. Now, it cannot be said that in sending the certificates to Bennett the company were holding out to the plaintiffs, of whom the company had at that time

(1) (1855) 5 H. L. C. 389.
(2) Ibid. 409–411.
(3) (1827) 4 Bing. 253; 29 R. R. 552.
(4) 2 H. & C. 175, 182, 186, 189.
(5) 2 H. & C. 175.
(6) L. R. 10 C. P. 307, 318.
(7) (1837) 6 Ad. & E. 469, 474; 45 R. R. 538.
(8) (1848) 2 Ex. 654, 663.

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never heard, that they, the plaintiffs, might safely act upon them: that would be carrying the law of estoppel too far. The conduct upon which a plaintiff can rely as constituting an estoppel must be conduct towards him directly, as in *Knights* v. *Wiffen* (1), where the foundation of the decision was that a liability arose through there having been a direct communication between the plaintiff and the defendant; and so in *Woodley* v. *Coventry*. (2) In *Coventry, Sheppard & Co.* v. *Great Eastern Ry. Co.* (3) the points were—(1.) that the statement by the railway company was untrue, and (2.) that the parties were brought together. There is no analogy between a document such as there was in that case—a delivery order for goods—and a certificate of shares. That case has, therefore, no bearing upon the present. Moreover, in that case (4) there was evidence of a custom to pledge goods on the faith of documents of that kind, whereas here there is no evidence of any such custom. As to *Seton, Laing & Co.* v. *Lafone* (5), the facts there throw no light on the present case. The short point there was that an untrue statement was made by A. to B. on which B. acted; the decision was nothing more than the application of the old rule of estoppel by conduct. There Lord Esher M.R. (6) quotes the proposition in *Carr* v. *London and North Western Ry. Co.* (7) as to negligence, and refers also to *Swan* v. *North British Australasian Co.* (8), observing that the expression "proximate cause" was used in that case as meaning the "real cause"—an expression to be preferred; and so also says Lopes L.J. (9) What then was the "real cause" of the plaintiffs' loss here? Clearly the fraudulent and dishonest act of Bennett. *Mayor, &c., of Merchants of the Staple of England* v. *Bank of England* (10) is very like *Bank of Ireland* v. *Trustees of Evans' Charities* (11), the plaintiff company having, as in the latter case, left their seal with their clerk, and it was held, upon the authority of the

(1) (1870) L. R. 5 Q. B. 660.
(2) (1863) 2 H. & C. 164.
(3) 11 Q. B. D. 776.
(4) Ibid. 781–2.
(5) 19 Q. B. D. 68.
(6) 19 Q. B. D. 70, 71.
(7) L. R. 10 C. P. 307.
(8) 2 H. & C. 175.
(9) 19 Q. B. D. 74.
(10) (1887) 21 Q. B. D. 160.
(11) 5 H. L. C. 389.

latter case, that, assuming the plaintiff company had in fact been negligent, their negligence was not the proximate cause of the loss sustained. Lord Esher M.R. (1) refers to the distinction drawn by Parke B. in the *Bank of Ireland Case* (2) between negligence generally and that specific act of negligence which alone could warrant the jury in finding that the plaintiffs were entitled to insist on the transfer in question being void. So here, the question is, not whether the company through their secretary were guilty of negligence, but whether they were guilty of a specific act of negligence giving the plaintiffs a good cause of action through that act being connected solely with the transaction between Bennett and the plaintiffs. The statements in the judgments (3) entirely cover the present case. *Scholfield* v. *Earl of Londesborough* (4) is a further authority—and there are many others—to the same effect. Accordingly, even assuming there was negligence on the part of the company, there was no breach of duty by them to the plaintiffs, and the plaintiffs have not shewn any direct connection between their loss and the sending of the certificate by the company's secretary to Bennett. The certification of the transfer to Messrs. Houselander and Madders was done at their request, and theirs only, and it was an act of which the plaintiffs never heard, so that it is impossible to say they were in any way connected with it. To sum up, we rely on three points: (1.) the negligence of the company did not form any part of the transaction between the plaintiffs and Bennett; (2.) that alleged negligence was not the direct, proximate or real cause inducing the plaintiffs to lend money to Bennett or of the plaintiffs' subsequent loss; and (3.) there was no untrue representation made in the certificates issued by the company to Bennett: the representation in them was in fact absolutely correct. (5)

Bramwell Davis, K.C., in reply. The cases cited on behalf of the defendant company depended upon the particular facts, and therefore have no direct bearing upon the present case,

(1) 21 Q. B. D. 172.
(2) 5 H. L. C. 389.
(3) 21 Q. B. D. 173, 174.
(4) [1896] A. C. 514.
(5) See *Rainford* v. *James Keith & Blackman Co.*, ante, p. 296.

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the circumstances of which I submit establish (1.) that the company owed a duty to the plaintiffs to be careful in seeing that the certificates were sent to the right person; (2.) that there was negligence on the part of the company; and (3.) that this negligence was the proximate cause of loss to the plaintiffs—a loss which would never have occurred but for that negligence. As to damages, I submit the plaintiffs are at least entitled to recover the 27*l.* 2*s.* 8*d.* which they had to pay in order to complete the sales to the purchasers of 250 shares, for in making these sales they were lulled into a sense of security by the receipts given to them on May 11 and 12, 1904.

VAUGHAN WILLIAMS L.J., after stating the object of the action, observed that, with regard to the allegation in the statement of claim of the sale of the 250 shares, and to the contention on the part of the plaintiffs that they had been lulled into a sense of security and so had been induced to make a sale of those shares, the answer was that there had been no proof of the allegation that they had been so lulled into a sense of security, and, moreover, the allegation itself did not go to that extent: accordingly that part of the case failed. His Lordship then proceeded:—

With regard to the two receipts of May 11 and 12, which are in the same form and are signed by the company's secretary, I wish to say this—that if the plaintiffs did rely on a receipt in that form as a recognition of their title and as a promise binding on the company that the share certificate should be given to them, they were, in my judgment, having regard to the terms of this document, relying upon that upon which they had no right at all to rely. When one considers the course of business, it would be very wrong indeed to assume that a secretary, in giving a receipt of this sort, either intends to recognise in the way suggested the title of the person lodging the transfer, or to bind the company to issue at the date named a share certificate. It is plain that the opportunities for making such an examination as would justify the giving of such a receipt cannot occur upon presentation of the transfers

and the application for receipt; and even if the secretary himself intended to give a receipt which would so bind the company he had, in my judgment, no authority to do anything of the sort.

I will now deal with the main part of the case, which is really based upon estoppel; and the alleged estoppel is said to have arisen in the course of what is called on the Stock Exchange "certification." It is said that in the course of this certification there arose a duty by the defendant company towards the plaintiffs, and that the defendant company, by their neglect of that duty and by their conduct, caused the plaintiffs to alter their position by believing in a state of facts which has turned out not to be true; and the plaintiffs say that under those circumstances the defendant company ought to be estopped from denying that such a state of facts existed, and that they, the plaintiffs, are therefore entitled to bring this action for the non-registration of these 1500 shares, and to have damages if they cannot have registration.

Now, with regard to certification, one cannot more concisely state what the practice is than to take the statement in the judgment delivered by Lindley L.J. in *Bishop* v. *Balkis Consolidated Co.* (1) He says: "The practice of giving 'certifications' has arisen from the difficulty felt by members of the Stock Exchange in settling their accounts as buyers and sellers of shares where the seller's certificate of title does not accompany his transfer. If the seller's certificate includes more shares than he sells, he does not deliver it to the buyer with the transfer, but the seller produces his certificate and the transfer to an officer of the company, and he 'certificates' the transfer; and buyers and their brokers act on the faith of this 'certification' just as they would if the certificate produced to the company had been produced to and lodged with themselves. No fee is paid for a 'certification.' In every case the 'certification' must be read in connection with the transfer on which it is put. The object of the 'certification' is to enable the transferor to satisfy his transferee that he, the transferor, can make a good title to the shares mentioned in

(1) 25 Q. B. D. 512, 519.

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the transfer. This he can only do if he is himself the registered owner of the shares mentioned in the transfer, or if he has a transfer from the registered owner to himself, or to some one through whom he claims by a transfer or series of transfers. The 'certification,' therefore, to be of any use at all, must amount to a representation that the transferor has produced to the person certifying such documents as on the face of them shew a primâ facie title in the transferor to transfer the shares mentioned in the transfer; or, in other words, that the transferor has produced to the person certifying either what purports to be a certificate of the title of the transferor to the shares mentioned in the transfer or the equivalent of such a document, in other words, what purports to be a certificate of the title of some one else to those shares, and one or more documents purporting to transfer those shares from such person to the transferor."

Now, in the present case the plaintiffs say they were induced to make advances to Peter Bennett by reason of his possession of the certificates which had been issued to him by the company. They say that, having regard to the practice of the Stock Exchange and of those who frequent the Stock Exchange, with reference to certification, when these certificates had once been lodged by Messrs. Houselander and Madders and their transfers had been certificated, it was wrong for the company to return these certificates to Bennett at all, and that it was only in consequence of this wrong return by the secretary of the company of these certificates to Bennett that Bennett was able improperly to produce these certificates to the plaintiffs and induce them to part with their money. According to my view of the facts of this case, and having regard both to the evidence and to admissions made on behalf of the defendants in the course of the argument, I have no doubt at all myself that, according to the practice of the Stock Exchange and to the practice of companies who make this certification really for the purpose of facilitating the dealings with shares on the Stock Exchange, as described by Lindley L.J. in that part of his judgment which I have read, if, on a proposed transfer of shares, a company has once had certificates lodged with it and has so

certified the accompanying transfer, the company does, in practice, retain the certificates which come with the transfer, and retain them until the proposed transfer has been carried out; in which case the company does not return the actual certificates which have been lodged, but cancels those certificates and issues fresh certificates, one for the number of shares transferred, and the other to the transferor for the balance of the shares not transferred. These certificates the company retain until they have proper information of the determination of the proposed transfer transaction between the proposed transferor and the purchaser. That is my view of the evidence. And if we had only to deal with the question of the duty of the company towards Messrs. Houselander and Madders—which we have not to deal with at present—I should be disposed to say that upon the evidence in this case there was a duty upon the company towards Messrs. Houselander and Madders to retain the certificates and to deal with them in the way I have described. But at present we have no evidence whatsoever before us to lead us to suppose that either by the practice of companies in the certification of shares, or in the common recognition of that practice on the Stock Exchange, any duty arises on a company in respect of the retention of the certificate and the dealing with it, after the certification of a transfer, to any one but the transferee who presents the transfer and the certificate for the purpose of certification. We have no evidence at all to shew that either the company or those who frequent the Stock Exchange have ever recognised any duty on the company except that towards the persons coming for the certification and, of course, those claiming through them. In the present case what is said is this—that immediately upon the lodging and retention of these certificates, and on the certification being completed, there arose a duty of the company towards persons who might desire to become shareholders in the company. I see no ground for supporting that proposition. As a matter of fact, in the present case all that is proved is that Bennett, being in possession of certificates which were properly issued to him by the company on his becoming a member of the company, improperly dealt with them, and so obtained an advance

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or advances from the plaintiffs upon the security of them. It is not alleged, and it is not the fact, that the plaintiffs had any knowledge whatsoever of the transfer to Messrs. Houselander and Madders having been presented for certification, or of the sending or returning by the company to Bennett of the certificates of the shares transferred. All they knew was that Bennett was, as they found was the fact, in possession of certificates which were genuine certificates and which had been issued to him by the company. It is perfectly plain, therefore, that in no sense can the plaintiffs be said to have been parties to the original transaction of the presentation of this transfer for purposes of certification, nor can it be said that the plaintiffs were in any way parties to that certification.

I do not think that Mr. Bramwell Davis in any way contests the conclusions of fact at which I have arrived; but what he does say is, "Yes, but although this is so you, the company, neglected your duty to retain these certificates, and your negligence is the real or proximate or direct cause of the loss which we have sustained." Now, to put the conclusion I have arrived at shortly, it seems to me that the answer to the plaintiffs' claim is, first, that, there being admittedly no duty to the plaintiffs personally whatever, they have failed to establish in respect of the retention of these certificates any duty on the part of the company to the public or to any section of the public, or, to define the suggested section a little more closely, to persons desirous of becoming members of the company; and, secondly, that even assuming that any such duty of the company could be established towards persons desirous of becoming members of the company, it is, in my opinion, not true to say that the sending or returning of the certificates to Bennett was the proximate, direct, or real cause (whichever expression may be used) of the loss which the plaintiffs have sustained by having advanced money to Bennett upon the security of certificates which, as between Bennett and Messrs. Houselander and Madders, Bennett was not entitled to deal with, he having already given a good title to Messrs. Houselander and Madders which prevented him from giving a good title to the plaintiffs. It is quite plain that the mere return of the certificates to

Bennett would have led to no loss to the plaintiffs whatever. What did cause the loss was the improper use of these certificates when they came into the possession of Bennett. For these reasons, I think, the plaintiffs' case fails.

Speaking generally of these cases of estoppel, it is necessary that the plaintiff should prove that he has been misled either by word of mouth or by conduct; and if by conduct, it must be by conduct in some transaction to which the plaintiff was a party. If the plaintiff is unable to raise a case of estoppel by such direct proof, then he must at least prove generally that the defendant has omitted to do some act which it was his duty to do towards the plaintiff, or the public, or some section of the public, or, as is suggested in this case, towards those who may be desirous of becoming members of the company. In my opinion, there is no proof here of any such misleading, or of negligence of duty towards the plaintiffs or towards any section of the public. The utmost that can be proved, according to my view of the case, is that there has been negligence—as indeed admittedly there has been. That is admitted not only in the statement of defence but in the evidence of the secretary of the company—negligence, that is to say, in the custody of these certificates. But the mere fact of negligence in the retention of these documents, and I may say generally the mere fact of the proof of negligence, is not sufficient to raise estoppel. At all events, ever since the decisions in *Bank of Ireland* v. *Trustees of Evans' Charities* (1) and in *Johnson* v. *Crédit Lyonnais Co.* (2) it cannot be said that mere negligence will raise an estoppel; you must have more than that: you must, at all events, have negligence which is the real and immediate cause of the damage done.

It will be remembered that Cockburn C.J., in his judgment in *Swan* v. *North British Australasian Co.* (3), treats it as an open question whether or not such negligence, when it is mere technical negligence, irrespective of negligence of a duty towards the plaintiff, may or may not raise some sort of estoppel when it is the real cause of the loss sustained by the

(1) 5 H. L. C. 389. (2) (1877) 3 C. P. D. 32.
(3) 2 H. & C. 175.

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plaintiff. He says (1): "It is to be observed that, in the case in the House of Lords to which I have referred"—that case was *Bank of Ireland* v. *Trustees of Evans' Charities* (2)—"it was unnecessary to decide the larger question, whether negligence leading to a forgery by which another party was defrauded estops the party guilty of it from disputing the genuineness of the instrument. The absence of negligence immediately leading to the result was at once a sufficient ground on which to dispose of the case."

So I say in the present case, there is "the absence of negligence immediately leading to the result" complained of, and, therefore, the estoppel is excluded.

I think I have now dealt with all the grounds to which I need refer in the present case. I think that the judgment of Farwell J. ought to be affirmed, because the plaintiffs have not been misled by any statement or conduct of the defendants; that the defendants have not been shewn to have been negligent of any duty which they owed to the plaintiffs individually or as members of a section of the public; and that the negligence which has been shewn in the custody of the certificates in question was not the immediate cause or the real cause which led to the loss by the plaintiffs.

I think the judgment of Farwell J. ought to be affirmed with costs.

ROMER L.J. I also think that the appeal fails. I can give my reasons shortly.

With regard to the main case of the plaintiffs, in the first place I may point out that they do not and cannot rely, as a cause of action against the company, on the certification given to Messrs. Houselander and Madders. That certification may have placed the company under special obligations to those gentlemen to whom it was given, or to those who claimed under them or had notice of the certification and relied on it; but the plaintiffs knew nothing whatever of the certification, and cannot base any claim upon it.

The ground alleged by the plaintiffs on which they claim to

(1) 2 H. & C. 192. (2) 5 H. L. C. 389.

hold the defendant company liable in this action is one of estoppel by what is said to have been culpable negligence on the part of the company in forwarding the certificates of the shares to Bennett after they had notice of the transfer to Messrs. Houselander and Madders and after recognition of that transfer by the certification.

Now, I may assume that there was negligence on the part of the company in so forwarding the certificates, as between the company and those persons who were entitled to rely on the certification—negligence which might have made the company liable to those persons; but, as I have pointed out, the plaintiffs are not such persons, and it appears to me to be pushing the doctrine of estoppel by negligence too far to say that in the present case, by forwarding the certificates to Bennett or by allowing him to retain them after he received them, the company must be taken to have held out to the world at large, or to any person dealing with Bennett, that Bennett's title, both legal and equitable, to the shares in question was good.

The certificate was true on the face of it; Bennett was in truth (as stated by the certificate) the registered holder and owner of the shares. And it is to be remembered that a certificate of shares is not a negotiable instrument, nor is it a warranty of title on the part of the company issuing it: see, among other cases, *Shropshire Union Railways and Canal Co.* v. *Reg.* (1) and *In re Ottos Kopje Diamond Mines, Ld.* (2)

I may, indeed, with regard to the certificate, repeat what Fry L.J. said of title-deeds in the case of *Northern Counties of England Fire Insurance Co.* v. *Whipp.* (3) He observed that the title-deeds could not be regarded as being in the eye of the law "analogous to fierce dogs or destructive elements, where from the nature of the thing the Courts have implied a general duty of safe custody on the part of the person having their possession or control."

I do not think that merely because the plaintiffs found the certificates in the hands of Bennett they were entitled to assume, as against the company, without inquiry of the

(1) (1875) L. R. 7 H. L. 496. (2) [1893] 1 Ch. 618.
(3) 26 Ch. D. 482, 493.

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company, that there had been no dealings by Bennett with the shares, or that the company held out that the owner could give a good title to the shares. If the plaintiffs have suffered loss by their dealings with Bennett, it arose, to my mind, from Bennett's fraud and from the plaintiffs taking upon themselves the risk involved in their accepting Bennett's title merely because he held the certificates, and not by any representation or breach of duty on the part of the company to or towards the plaintiffs.

With regard to the small subsidiary point made by Mr. Bramwell Davis on this appeal with reference to the item of damage on the sale of the 250 shares, all I need say is that that special cause of action urged by him was not pleaded nor proved nor, as I understand it, even properly taken in the Court below. It follows that the whole appeal fails and should be dismissed with costs.

STIRLING L.J. I am of the same opinion. [After shortly stating the facts his Lordship continued :—]

Now, with regard to certification, that is not an act the performance of which is imposed on the company either by any provision in the Companies Act, 1862, or in the articles of association. It is therefore one which the company may see fit to do or not to do; but if the company do see fit to give a certification, then, as at present advised, I think that by that act the company do undertake a duty to any person who deals with shares on the faith of the certification. If the plaintiffs had dealt with these shares on the faith of that certification it would have been necessary to define the extent and nature of that duty; but the plaintiffs knew nothing whatever of the certification and did not act on the faith of it. Further, when the plaintiffs made their advance they knew nothing of the circumstances in which the certificates had been sent by the defendant company to Bennett, and, consequently, the plaintiffs did not change their position by relying on the special circumstances in which the certificates came to Bennett's hands. What the plaintiffs did rely on was merely the certificates and the possession of them by Bennett. The certificates were in

the ordinary form, under the seal of the company, and simply certified that Bennett was the registered holder of certain shares specified, subject to the memorandum and articles of association. The statements in the certificates were perfectly accurate; for when Bennett deposited them with the plaintiffs he was in fact the registered holder of these shares.

Then, as regards the possession of the certificates, by s. 31 of the Companies Act, 1862, a certificate is primâ facie evidence of the title of a member to the share or shares which are specified; but it is only primâ facie evidence, and a person who deals with another on the faith of only a primâ facie title is always liable to find that another and better title may be brought forward which will supersede that which is derived from the certificate. That is what took place here. The plaintiffs' title failed because Bennett had created a prior title in favour of Messrs. Houselander and Madders and was not in a position to confer a good title on the plaintiffs.

The case which is put forward on behalf of the plaintiffs is this—that the defendants were guilty of culpable neglect and are estopped from disputing that the plaintiffs have a title to the shares. An estoppel may be created, no doubt, by negligence.

The limitations on the rule are stated and were very much considered in the case of *Swan* v. *North British Australasian Co.* (1) Blackburn J. in dealing with the case states the rule thus: he refers to what had been laid down as the rule by Wilde B. in the Court of Exchequer, which was in these terms: "'That if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons to shew that state of facts did not exist.'" Then Blackburn J. says: "This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing

(1) 2 H. & C. 175, 182.

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to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

Now, in my judgment, not one of the limitations which Blackburn J. there imposes on the application of the doctrine of estoppel by negligence is found satisfied in the present case. The neglect—and I think there was neglect—which occurred in this transaction was not in the transaction with the plaintiffs; it was in the transaction with Messrs. Houselander and Madders. Secondly, the neglect was not the proximate cause of the plaintiffs' mistake; for the plaintiffs knew nothing of this neglect or of the way in which the company had dealt with the certificates. Lastly, I think there was no neglect of duty to the plaintiffs, though there was a neglect of a duty owing to persons with whom the plaintiffs were not privy. I intended, with regard to that, to refer to what was said by Fry L.J. in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1); but the material passage has been already read, and I need not repeat it.

I think, therefore, that the plaintiffs fail in establishing their case, and that the appeal should be dismissed.

Solicitors: *Minton Slater & Co.; Paines, Blyth & Huxtable.*

(1) 26 Ch. D. 482.

G. I. F. C.

In re SWAIN. MONCKTON *v.* HANDS.

[1904 S. 2101.]

C. A. 1905 March 9, 30.

Will—Construction—Charity, Gift to—Condition Precedent—Remoteness—Perpetuity—Postponement of Enjoyment—Reserve Fund—Uncertain Event—Validity of Gift.

A testator gave his residuary real and personal estate to a trustee upon trust thereout to form a "reserve fund" for the purposes thereinafter mentioned, and to pay the balance of the income of his said residuary estate, after payment of outgoings, to his niece during her life, and after her death to pay such income (after payment into the said reserve fund every quarter of a year of 10 per cent. of such income, and also certain outgoings) by equal monthly payments to three annuitants for their respective lives, who should be poor inhabitants of M. And the testator directed that "the said annuities shall not become payable until the said reserve fund shall amount to 400*l.*," and that the said reserve fund should be invested and only used in case of dire need, but be always kept up at 400*l.*; and that if, after the said annuities were payable, it should exceed 400*l.*, then the overplus might be used either to increase the amounts of the said three annuities or to create another annuity.

The testator's net residue consisted solely of real estate, and during the lifetime of the niece, the tenant for life, there was no income available for forming a reserve fund. On the death of the niece questions arose upon the construction of the will—(1.) whether the charitable gifts of the annuities failed by reason of the direction that the annuities should not come into operation until after the reserve fund amounted to 400*l.*, which might be at a date beyond the limits of the rule against perpetuities; and (2.) whether there had been an effectual devotion of the "reserve fund" to charitable purposes:—

Held, by the Court of Appeal (reversing Buckley J.), that, subject to the life estate, the residue had been effectually devoted to charity as from the testator's death, and that the direction to postpone the payment of the annuities until the reserve fund reached 400*l.* was not a condition precedent to the charitable gift coming into effect, but was only a direction as to the particular application of the charitable fund and intended to secure the beneficial working of the charity, and that the case, therefore, fell within the second principle in *Chamberlayne* v. *Brockett*, (1872) L. R. 8 Ch. 206, 211; also that the reserve fund was equally devoted to a charitable purpose.

ROBERT SWAIN, by his will dated May 17, 1897, after appointing the plaintiff Herbert Monckton his sole trustee

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and executor, bequeathed certain small pecuniary legacies, a specific legacy, and two annuities of 20*l.* each, and directed that those annuities should be a first charge on his property. And he devised and bequeathed to his said trustee all the rest, residue, and remainder of his real and personal estate upon trust—(1.) to place on deposit in the Maidstone branch of the London and County Bank the balance (if any after payment of his debts, funeral and testamentary expenses) of any money standing to his credit at the Hackney branch of the same bank, "to form a reserve fund for the purposes hereinafter mentioned, and also to pay into the said reserve fund any interest allowed by the bank on such deposit account"; (2.) to pay to his niece, Elizabeth Price, the balance of the income of his said real and personal estate (after payment of outgoings and expenses) during her life; "And after the decease of the said Elizabeth Price, upon trust to pay the balance of the income arising from my said real and personal estate (after payment into the said reserve fund every quarter of a year of ten per centum from the gross income arising from the residue of my real and personal estate, and also all outgoings and expenses which may be payable or which my trustee may think fit to deduct or pay thereout) by equal monthly payments to the three following annuitants for their respective lives," who were to be poor inhabitants of Maidstone possessing special qualifications defined by the testator. The will then proceeded as follows: "I further direct that the said annuities shall not become payable until the said reserve fund shall amount to 400*l.* I further direct that the said reserve fund may, if the said trustee thinks fit, be invested in any British Government stock permitted to trustees, and shall only be used in case of dire need, such as loss of rent, deprivation of property, payment of duties, or any other special circumstances; but if any portion of the said fund be expended, such fund shall be raised again to the said sum of 400*l.*, it being my wish and intention that such fund shall always stand at 400*l.* I further direct that if the said reserve fund (less any payments or deductions my said trustee may make thereout) shall, after the hereinbefore mentioned annuities are payable, exceed the

amount of 400*l.*, then I empower my said trustee at his sole discretion to use the overplus either to increase the amounts of the three aforesaid annuities or create another annuity."

The testator died on May 27, 1900, possessed of real and personal estate. Elizabeth Price, the tenant for life, died on March 17, 1904. The testator's personal estate not specifically bequeathed (including the balance standing to his credit at the Hackney branch of the London and County Bank) was insufficient for the payment of his funeral and testamentary expenses, debts, and pecuniary legacies, and the deficiency was therefore raised by the trustee by mortgage of his real estate, so that his residuary estate consisted inclusively of real estate, subject to the mortgage. The real estate, which was held in gavelkind, comprised old and dilapidated buildings yielding but a small rental and requiring large sums to put them in repair. During the lifetime of Elizabeth Price the whole of the income from this real estate was exhausted by the payment to her of the balance thereof after keeping down the interest on the mortgage and paying the two annuities of 20*l.* each.

No "reserve fund" having yet been formed by the trustee, he took out an originating summons against the two annuitants of 20*l.* each and the Attorney-General raising, in effect, the following questions upon the construction of the will: (1.) whether the charitable gifts of the annuities failed by reason of the testator's direction that the annuities should not come into operation until after the reserve fund amounted to 400*l.*, which might be at a date beyond the limits prescribed by the rule against perpetuities; and (2.) whether the testator had effectually devoted the reserve fund to charitable purposes.

By an order of the master in chambers the plaintiff was directed to represent the testator's heirs or co-heirs in gavelkind, who had not yet been ascertained.

On the hearing of the summons Buckley J. held that the direction to form a reserve fund was bad for perpetuity, and that the alleged charitable gifts wholly failed.

The Attorney-General appealed.

R. J. Parker, for the Attorney-General. Since *Chamberlayne* v.

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Brockett (1) it cannot be denied that a gift to charity dependent upon a condition precedent so remote as to transgress the rule against perpetuities is void. But that is not the case here. This is a gift to charitable objects immediately upon the death of the testator, subject only to the prior life estate, and the other clauses in the will are merely directions for the purpose of rendering the testator's charitable intention effective. In *Chamberlayne* v. *Brockett* (2) the principles as to the applicability of the rule against perpetuities to charitable gifts are stated to be, in effect, as follows. First, an immediate and valid gift to charity is not rendered invalid by its actual application being indefinitely suspended or in abeyance or incapable of being used for the particular purposes intended: in that case the rule against perpetuities is not applicable, and if strict compliance with the testator's directions is impracticable the Court may apply the fund cy-près. Secondly, if the gift intended for charity is itself conditional—if it is so remote and indefinite as to transgress the rule—the gift fails ab initio.

Buckley J. has held that the present case falls within the second principle, but I submit that it really falls within the first. The difficulty arises mainly upon the direction in clause 2 of the will that "the said annuities shall not become payable until the said reserve fund shall amount to 400*l*.," an event which may remain in suspense or abeyance for an indefinite time; but that, according to the first principle above stated, does not make the charitable gift invalid, provided the gift is immediate, as I submit it is. It is absurd to suppose that the testator ever intended any intestacy: all he meant was that, in order to give effect to his immediate charitable gift, there should, after the death of the tenant for life, be an accumulation of income to form the reserve fund; and that reserve fund is itself devoted to a charitable purpose. This is not a contingent gift to a charity. What the testator intended was to give a fund to charity immediately, but that the personal enjoyment of it should be postponed until, for its better administration, there should be a fund to support it. The direction postponing the enjoyment is not in any sense a con-

(1) L. R. 8 Ch. 206. (2) L. R. 8 Ch. 211.

dition precedent, but merely a postponement of enjoyment for the benefit of the charity. An analogous case to the present is to be found in *Martin* v. *Maugham* (1), where, in a charitable gift, the perpetuity rule had been infringed by a direction to accumulate beyond the legal period; but Shadwell V.-C. held that, as the testator had shewn an intention to devote his property to charitable purposes, the next of kin had no claim. He therefore declared that there was a good gift to charitable purposes according to a scheme to be settled by the master.

My case may, however, be presented in another aspect. It is now well settled that a legatee may put an end to an accumulation which is exclusively for his benefit; and that principle is as applicable to a charity as to an individual: *Wharton* v. *Masterman* (2), where *Saunders* v. *Vautier* (3) was discussed. It is true that in *Wharton* v. *Masterman* (2) there was no infringement of the perpetuity rule, the question only being as to accumulations being void under the Thellusson Act (39 & 40 Geo. 3, c. 98), but I submit that the same principle applies just as much to a question of remoteness as to a question of void accumulations: *Oddie* v. *Brown*. (4) I submit, therefore, that in considering the application of the rule as to remoteness a charity can be treated in the same manner as an individual. This is a good charitable gift and a scheme should be directed.

Buckmaster, K.C., and *Gatey*, for the plaintiff, who was directed by their Lordships to represent all persons beneficially interested under the will as well as the testator's unascertained heir or co-heirs in gavelkind. We do not dispute that the annuities given are charitable in their nature, but our contention is that the dispositions have failed because the annuities are not payable until after the reserve fund has amounted to 400*l.*, an event which may transgress the rule against perpetuities: there is therefore an intestacy. If a gift to charity is postponed to an event beyond a life in being and twenty-one years, that gift is void, just as in the case of such a gift to an individual. The true construction of this will seems to be that

(1) (1844) 14 Sim. 230; 65 R. R. 571.
(2) [1895] A. C. 186.
(3) (1841) 4 Beav. 115; Cr. & Ph. 240; 54 R. R. 286.
(4) (1859) 4 De G. & J. 179, 196.

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there is a direction to accumulate income until the fund reaches 400*l.*, an indefinite event, and then, and not till then, a gift to charity; if so, the gift is bad. Again, there is no actual gift of the 400*l.* to charity at all, and therefore the authorities cited do not apply: they only apply where there is a gift to charity in the first instance. The test is this—that the charity cannot come now and claim the 400*l.* We admit that if there were a present gift to charity, followed by a direction to accumulate, the cases cited would apply; but here, first, there is no gift of the 400*l.*; and, secondly, if the testator has made any gift to charity at all, it is only in the form of a direction to "pay," and to pay at a period too remote. The so-called charitable gift is not of 400*l.*, but only of a fund uncertain in amount. In short, the charitable gift of the annuities is void because it transgresses the perpetuity rule, and the reserve fund is not only not given to charity at all, but it is also uncertain, and in fact may never come into existence.

R. J. Parker, in reply.

March 30. The judgment of the Court (Vaughan Williams and Stirling L.JJ.) was delivered by

STIRLING L.J. The question in this case depends on what is the true construction of the will, dated May 17, 1897, of Robert Swain, of which the material provisions are the following. [His Lordship then read the provisions above stated, and, with reference to clause 1, called attention to the fact that the personal estate of the testator (including the balance standing to his credit at the Hackney branch of the London and County Bank) was insufficient for payment of his debts, funeral, and testamentary expenses, and that consequently nothing was available from that source for the formation of the contemplated reserve fund. His Lordship then proceeded:—]

It was admitted in argument that the annuities were charitable in their nature; but it was said that these dispositions failed because the testator had directed that the annuities should not come into operation until after the reserve fund amounted to 400*l.*, which might be at a date beyond the limits prescribed by the rule against perpetuities; and further that

the testator had not devoted the reserve fund to charitable purposes. We propose to deal first with the latter contention; for if it is well founded it disposes of the case.

Now the reserve fund was to be derived from two sources: first, the testator's balance at the Hackney branch of the London and County Bank, which failed, as we have already stated; secondly, a quarterly sum of 10*l.* per cent. on the gross income of his residuary real and personal estate. This quarterly sum was to be placed on deposit with the Maidstone branch of the same bank, and by clause 1 any interest allowed by the bank was to go to increase the reserve fund. The reserve fund was to accumulate until it reached 400*l.*: whenever it exceeded that amount (as it must necessarily do if the testator's residuary estate continued to yield income), then, in our opinion, the surplus was to be applied either in increasing the three annuities specified in the will or creating an additional annuity. The terms of the will, though not very happily expressed, appear to us to impose on the trustee the duty of applying the surplus in one or other of those ways, and to limit his discretion only to a choice between them. That surplus, therefore, appears to us to be given to the charitable purpose intended by the testator.

But what is the destiny of the reserve fund to the extent of 400*l.*? In our judgment it was to constitute a fund to which recourse might be had in case the corpus of his residuary estate should fail from unforeseen circumstances—such as loss of rent, depreciation of property, or unexpected claims for duty—to yield sufficient to pay the annuities intended by the testator. It was to be a "reserve fund," by which we understand a fund kept in reserve by way of provision against accidental losses of the corpus of the testator's estate, and consequently a fund intended to insure the beneficial working of the charity intended to be founded by the testator. We think, therefore, that it was devoted to a charitable purpose, no less than the corpus of the testator's residuary estate.

This being so, we return to the first point, namely, whether the charitable dispositions are bad by reason of their infringing the rule against perpetuities. The law on this subject is laid

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down in *Chamberlayne* v. *Brockett* (1), and it is to the following effect. An immediate gift to a charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all, except on the occurrence of events in their essence contingent and uncertain: while, on the other hand, a gift in trust for a charity which is conditional upon a future and uncertain event is subject to the same rules as any other estate depending on its coming into existence upon a condition precedent. The question is under which branch of the rule the present case falls. Buckley J. has held that it is governed by the latter branch. With the greatest respect, we are unable to agree with the learned judge. We think that, subject to the life estate given to Elizabeth Price, the residuary real and personal estate was devoted to charity as from the testator's death, and that the direction to postpone the payment of the annuities until the reserve fund reached 400*l.* was not a condition precedent to the charitable gift coming into effect, but was a direction as to the particular application of the charitable fund, and was intended to secure the working of the charity in the most beneficial manner. The case of *Martin* v. *Maugham* (2) seems to be an authority for so treating the present case.

We think, therefore, that the appeal ought to be allowed.

[Their Lordships accordingly directed that a scheme should be settled for the regulation of the charity.]

Solicitors: *The Solicitor to the Treasury; S. W. Woolmer.*

(1) L. R. 8 Ch. 206. (2) 14 Sim. 230; 65 R. R. 571.

G. I. F. C.

JAMAICA RAILWAY COMPANY *v.* COLONIAL BANK.

C. A. 1905 March 29, 30.

[1898 J. 939.]

Practice — Amended Writ — Re-service — Personal Service — Non-appearing Defendant—Discretion of Court—Rules of Supreme Court, Order IX., *r.* 2; *Order* XVI., *r.* 13; *Order* XVII., *r.* 4; *Order* XIX., *r.* 10; *Order* XXVIII., *rr.* 1, 10; *Order* LXVII., *rr.* 4, 5.

There is no hard and fast rule that an amended writ, whatever be the nature of the amendment, must be re-served personally on a defendant who has not appeared to the original writ.

The Rules of the Supreme Court make no provision for the personal service of an amended writ, and therefore rule 4 of Order LXVII. applies, and an amended writ may be served on a defendant who has not appeared by filing it with the proper officer. When this has been done the Court has jurisdiction to proceed to try the action as against such a defendant.

But the Court has a discretion in the matter, and, if it can see that there is any probability of injustice being otherwise done to the absent defendant, it will require that he be served personally with the amended writ—e.g., if the indorsement on the writ has been amended in such a way as substantially to enlarge the relief claimed against him, and to make the writ in effect a new writ.

Per Stirling L.J.: On granting leave to amend a writ the judge can, if he thinks it right to do so, impose the condition that the amended writ shall be served personally on a defendant who has not appeared to the original writ.

An action was brought by a Colonial railway company and the then Governor of the Colony, who in the statement of claim was stated to be suing on behalf of the Government. One of the defendants did not appear to the writ. A change of Governor took place, and, in pursuance of leave given by the Court, the writ was then amended by adding the name of the new Governor as a plaintiff, and the statement of claim was amended by stating that he was suing on behalf of the Government:—

Held, that the non-appearing defendant was sufficiently served by filing the amended writ in pursuance of rule 4 of Order LXVII.

Decision of Swinfen Eady J. reversed.

The Cassiopeia, (1879) 4 P. D. 188, *Webster* v. *Myer*, (1884) 14 Q. B. D. 231, *Gee* v. *Bell*, (1887) 35 Ch. D. 160, *In re Hartley*, [1891] 2 Ch. 121, and *Tilling, Ld.* v. *Blythe*, [1899] 1 Q. B. 557, discussed and explained.

APPEAL from a decision of Swinfen Eady J.

The question was whether an amended writ ought to have been served personally upon defendants who had not appeared to the original writ.

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The plaintiffs were the Jamaica Railway Company and Sir Augustus Hemming, who, when the writ was issued, was the Governor of the island of Jamaica. The statement of claim alleged (paragraph 40) that he sued in the action on behalf of the Government of the island.

The defendants were the Colonial Bank and the West Indian Improvement Company.

By their statement of claim the plaintiffs claimed (inter alia)—(1.) a declaration that certain moneys stated to be in the hands of the defendant bank were applicable for the purposes (*a*) of providing rolling stock for the railway of the plaintiff company, and (*b*) of completing the extensions of that railway in accordance with a contract mentioned in the statement of claim and called the "Construction Contract," and that those moneys might properly be applied for those purposes by or under the direction of the plaintiffs; (2.) that the defendants might be ordered to pay over the said moneys to the plaintiffs on their undertaking to apply the same for the purposes aforesaid.

The writ was duly served on both the defendants. The Colonial Bank entered an appearance to the writ, but the West Indian Company did not appear.

Before the action came on for trial Sir Augustus Hemming had ceased to be Governor of Jamaica and Sir James Swettenham had been appointed Governor in his place.

On November 21, 1904, upon a summons by the plaintiffs, and on the consent of Sir James Swettenham and his submission to be bound by and having the benefit of all proceedings in the action up to that time, an order was made by Swinfen Eady J. at chambers that the applicants should be at liberty to amend the writ and pleadings in the action by adding Sir James Swettenham as a plaintiff, and also paragraph 40 of the statement of claim so far as might be necessary in consequence of the addition of Sir James Swettenham as a plaintiff.

In pursuance of this order the writ and the statement of claim were amended by adding Sir James Swettenham as a plaintiff, and paragraph 40 of the statement of claim was

amended by stating that he had succeeded Sir Augustus Hemming in the office of Governor of the island on September 30, 1904, and that he sued as such Governor and on behalf of the Government of the island.

The amended writ was served on the West Indian Company, the non-appearing defendants, by filing it at the Central Office.

When the action came on for trial the preliminary objection was taken on behalf of the Colonial Bank that the West Indian Company had not been properly served.

Swinfen Eady J. allowed this objection, and made an order that, "the Court being of opinion that the defendants the West Indian Company have not been properly served with the amended writ, the action do stand over generally, with liberty to apply to restore the same."

In giving judgment Swinfen Eady J. said that he had made inquiry of the Masters, and had ascertained that, notwithstanding the decision of North J. in *In re Hartley* (1), it was the invariable practice of the Central Office to require a writ which had been amended by adding one or more plaintiffs, or by altering the claim indorsed on the writ, to be re-served on a defendant who had not appeared. In his Lordship's opinion that was the correct practice. A writ required personal service, and after the writ had been amended the writ in its original form no longer existed on the file; and, unless it was re-served, the document as amended, which was the writ then in force, would not have been served on the defendant. Rule 4 of Order LXVII. applied to documents of which personal service was not required, and for a writ personal service was requisite.

The plaintiffs appealed.

Neville, K.C., T. H. Carson, K.C., and *F. F. Greenland*, for the plaintiffs. It is submitted that the filing of the amended writ was sufficient notice to the West Indian Company. The only case in which the Rules say that an amended writ must be re-served is when a new defendant is added. The amendment in the present case is purely formal; it is only the addition as a plaintiff of the new Governor of Jamaica. There

(1) [1891] 2 Ch. 121.

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is no reason why notice of that addition should be given to the West Indian Company. No doubt an amended writ ought to be re-served unless the Rules say that that is not necessary; and it is submitted that they do say so in a case like this in which the indorsement has not been amended, and the defendants, the West Indian Company, have not entered an appearance: *In re Hartley*. (1) It appears to be the practice of the Central Office in every case to require personal service of an amended writ on a defendant who has not appeared, but there is no authority for that practice. Service of the writ is provided for by Order IX., r. 1. (2) Order XVI., rr. 11, 12,

(1) [1891] 2 Ch. 121.

(2) By Order IX., r. 1, "No service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance."

Rule 2: "When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may seem just."

Order XVI., r. 2: "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a bonâ fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

Rule 11 . . . .: "The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as a defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

Rule 13: "Where a defendant is added or substituted, the plaintiff shall, unless otherwise ordered by the Court or a judge, file an amended copy of and sue out a writ of summons, and serve such new defendant

give power to add parties; and by rule 13, where a new defendant is added, he must be served with the amended writ in the same way as original defendants are served. That is the only provision in the Rules for re-serving an amended writ; rule 11 contemplates the addition of a plaintiff, but rule 13 applies only when a defendant is added. Order XXVIII., r. 10, provides that when any indorsement or pleading is amended the amended document shall be delivered to the opposite party.

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with such writ or notice in lieu of service thereof in the same manner as original defendants are served."

Order XVII., r. 4: "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and such new party or parties may be obtained ex parte on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence."

Order XIX., r. 10: "Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer."

Order XXVIII., r. 1: "The Court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Rule 10: "Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same."

Order LXVII., r. 4: "Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, has omitted to give an address for service as required by Orders IV. and XII., all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings and written communications in respect of which personal service is not requisite may be served by filing them with the proper officer."

Rule 5: "Where personal service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required by these rules or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons."

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Therefore personal service is not necessary. Under Order XIX., r. 10, if no appearance has been entered for any party, any document required to be delivered to a party is to be delivered by being filed with the proper officer. By rule 4 of Order LXVII., in every case in which a document may be delivered to a defendant who has appeared it can be filed against one who has not appeared. The amended writ in this case comes under that rule and Order XXVIII., r. 10. It has to be delivered, not served; and it may be delivered by being filed: Daniell's Chancery Practice, 7th ed. p. 276; Yearly Practice for 1905, p. 336. The practice of the Central Office is stated in the Annual Practice for 1905, pp. 47, 171, 360, and 1027.

Filing the amended writ instead of serving the West Indian Company with notice of it can do them no harm. It was decided in *Gee* v. *Bell* (1) that notwithstanding Order XX., r. 4, a plaintiff cannot, when the defendant has not appeared to the writ and a statement of claim has been delivered to him by filing it, obtain judgment in default of appearance for more than he has claimed by his writ. If a defendant does not enter an appearance he takes the risks of the action, but he can find out what has happened by searching the file. The practice of filing was introduced in order to avoid the trouble of obtaining orders for substituted service and with the object of enabling the Court to make the proper order: *Dymond* v. *Croft*. (2) It is true that in *The Cassiopeia* (3) James L.J. said: "As to the general point of practice, although it is not in question in this case, I may state my strong opinion that an amended writ must be served in the same manner as if it had been an original writ." But that was only a dictum, and it turned upon the Rules of 1875, in which there was no rule like the present Order LXVII., r. 4; and Order XXVII., r. 10, which corresponded with the present Order XXVIII., r. 10, was in narrower terms. An amended writ is not a new writ: *Re Jones*. (4) A writ cannot be amended without leave: Order XXVIII., r. 1. When the Court gives leave it will see that no injustice is done.

(1) 35 Ch. D. 160.
(2) (1876) 3 Ch. D. 512.
(3) 4 P. D. 188, 189.
(4) (1877) 46 L. J. (Ch.) 316.

[VAUGHAN WILLIAMS L.J. If the Court thought a foreign defendant ought to be served with notice it would be with notice of the amendment, not with notice of the amended writ, which would make the action start from the amendment.]

No practice of the Central Office is of any legal authority unless it has been established by the Court: *Stumm* v. *Dixon & Co.* (1)

Eve, K.C., and *Christopher James*, for the Colonial Bank. It is submitted that Order LXVII., r. 4, does not apply to writs of summons. It would be most dangerous to allow amended writs to be filed in this way against defendants who do not appear. The plaintiff might amend by adding another plaintiff; set up a different cause of action of which the defendant would have no notice; and obtain judgment on a short cause of which the defendant knew nothing. An executor defendant might have no defence to an action by infants, and might decline for that reason to enter an appearance; but, if adults were added as plaintiffs, he might have a good defence against them, and yet he would have no notice of the amendment. A plaintiff cannot on motion for judgment in default of appearance obtain more relief than he asks in his writ. The suggested practice would have the result that it would only be necessary to amend the writ and file the amended writ to enable the plaintiff to obtain a larger relief than he had claimed by the writ. That is the principle upon which *Gee* v. *Bell* (2) was decided. Primâ facie a writ must be served personally: Order IX., r. 2. It is conceded that there is no rule which says that a writ which has been amended by the addition of a plaintiff must be served in that way; but there is no rule to the contrary. Order XVI., rr. 11, 13, only say that if you add a defendant you must bring him into the action properly by service. There is nothing in the rules about the service of amended writs except Order LXVII., r. 4, and it is submitted that that rule does not apply. If it is said that the Court will take care that no injustice is done to an absent defendant, the Court might not know what defence the defendant would have to the amended writ. The bank do

(1) (1889) 22 Q. B. D. 529, 531. (2) 35 Ch. D. 160.

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not yet know what the object of the amendments is. It so happens that in the present case there are other defendants who can represent to the Court that injustice might be caused to the absent defendants if personal service is not required, but the principle would apply equally to a case in which no defendant had appeared, and the possible injustice might not occur to the judge. It has been held that the words "or otherwise" in rule 5 of Order LXVII. apply to an originating summons.

[ROMER L.J. Such a summons is in the nature of a writ.]

In some cases as to which the Rules have made no provision it has been held that personal service is requisite, and it is submitted that the present is a casus omissus: *In re Hartley* (1); *Gee* v. *Bell* (2); *Webster* v. *Myer* (3); *Tilling, Ld.* v. *Blythe.* (4) It is submitted that the recognised principle of the Court is that, even though the rules do not expressly require personal service, notice should be given to an absent defendant. It is a matter of importance to the Colonial Bank that every step should be taken regularly and that the West Indian Company may be bound by the proceedings. In *Jackson* v. *Kilham* (5) an order of revivor was filed as against a non-appearing defendant after judgment in the action. An amended writ is a writ, and it is submitted that personal service is requisite, just as in the case of the original writ, and therefore Order LXVII., r. 4, does not apply.

VAUGHAN WILLIAMS L.J. In my opinion this order of Swinfen Eady J. is wrong. In my judgment it is not true to say that the West Indian Company have not been properly served with the amended writ. The amendment with which we have to deal is of this nature. The action having been brought by the Jamaica Railway Company and Sir A. Hemming, the then Governor, representing the Government of Jamaica, there occurred a change in the person of the Governor. Sir A.

(1) [1891] 2 Ch. 121.
(2) 35 Ch. D. 160.
(3) 14 Q. B. D. 231.
(4) [1899] 1 Q. B. 557.
(5) [1891] W. N. 171.

Hemming ceased to be Governor and Sir J. Swettenham succeeded him, and that necessitated the amendment. The order was to add Sir J. Swettenham as plaintiff. Now primâ facie the question whether this amended writ required personal service upon the defendants who had not appeared must depend upon the Rules.

The rule upon which reliance has been chiefly placed by those who say that there was no necessity for personal service of the writ thus amended is rule 4 of Order LXVII. [His Lordship read the rule.]

There is no question but that, if filing is sufficient, the writ has been duly filed with the proper officer in compliance with rule 4 of Order LXVII. But it is said that the filing is not sufficient because it is necessary to serve the amended writ personally upon the West Indian Company. That being so, I look in the first instance to see whether this amended writ falls within the terms of rule 4. It is suggested that it falls within the term "writs," and in my judgment an amended writ does fall within that term. If the amended writ was a new writ it would not fall within rule 4, because the words of that rule exclude from its operation writs or other documents in respect of which personal service is requisite. It applies only to writs and documents "in respect of which personal service is not requisite." I do not suppose any one will deny that an amended writ, if it is not a document in respect of which personal service is requisite, falls within rule 4.

In those circumstances the question I have now to ask is simply this: Is a writ, amended in the way in which this writ has been amended, a document in respect of which personal service is requisite? I ask first whether it is requisite by the Rules. Now dealing merely with the Rules it seems to me that personal service is not requisite. Order IX., r. 2, provides for the personal service of a writ. [His Lordship read the rule.]

There is no dispute that in the present case the original writ was served personally. I can find in this rule no obligation to serve a writ personally a second time, and therefore I have to ask—Is this writ after the amendment still the same writ? If it is, it has been served, and I can find in the Rules

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no provision that a writ which has once been served shall be re-served or served as a separate writ. In these circumstances it seems to me in the first instance that this amended writ is a writ within the meaning of rule 4 of Order LXVII., and that it is not a writ to which rule 2 of Order IX. applies. Primâ facie, therefore, this amended writ not requiring personal service, and having been dealt with in the manner required by rule 4 of Order LXVII. in respect of documents not requiring personal service, the order of Swinfen Eady J. is wrong in saying that the document has not been properly served. In my judgment it was properly served as the original writ was, and there is no provision in the Rules for the re-service of a writ upon its being amended in the way in which this writ has been amended.

The respondents' counsel met this by saying that this is a casus omissus; it is not dealt with by the Rules at all, and we ought to assume that, independently of any express provisions in the Rules, every amended writ ought to be re-served after amendment. I cannot agree that we ought to make that assumption. Amongst other reasons for not doing so I find that by rule 10 of Order XXVIII., "Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party" (not personally served) "within the time allowed for amending the same." An amendment of the indorsement of the writ, or an amendment of the pleading, may affect the character of the action just as much as, and generally speaking more than, an amendment of the writ by the addition of a new party. In the face of this provision of rule 10 of Order XXVIII. it seems to me impossible to say that every amendment of a writ requires a re-service of the writ. I think Mr. Christopher James in the course of his argument admitted that he could not maintain that general proposition. I quite assent to the suggestion that every amendment of a writ which makes it a new writ will require personal service, but that is true because such a case falls plainly within rule 2 of Order IX. But, in my judgment, unless the nature of the amendment is such as to make the amended writ a new writ, there is nothing

in the Rules which requires any personal service of the amended writ. If an amended writ comes within the terms of rule 4 of Order LXVII., and it is not a new writ, there is nothing in the Rules which requires personal service. But in addition to that, if we look at the substance of the transaction, it is plain that it is covered by Order XVII., r. 4, and that in a case which did not differ in substance from the present case you could, by making the proper application and obtaining the proper order, effect an amendment of this character without anything in the nature of a re-service of the writ.

Then it is said that there are many cases in which the absence of personal service might work great hardship and do grave injustice, or render grave injustice possible or probable, and that therefore we ought so to construe the Rules as to render the occurrence of injustice impossible. I am inclined to think that I am stating this argument in too complimentary language. It is not really an invitation to the Court so to construe the Rules as to make an injustice impossible; it is, I think, an invitation so to misconstrue the Rules as to render an injustice impossible. In my judgment that is not part of the functions of the Court of Appeal. If the Rules are so expressed that, construed according to their plain and obvious sense, injustice will be worked by them, the proper way of preventing that is, not by legislation or rule-making in the Court of Appeal, but by bringing the matter to the notice of the Rule Committee or the Legislature, as the case may be. But, in my judgment, there is no substantial danger of any such injustice. It is admitted that in many cases by the addition of a plaintiff the substance of the action will not be altered at all. It will hardly be denied that in such cases there could be no necessity, so far as justice is concerned, for the re-service of the writ upon a defendant who has not appeared. Although there are no doubt cases in which it would be unjust to proceed to judgment, because of the danger that the absent defendant may have been lulled into a sense of false security, by reason of the amendment not having in fact come to his notice, no case has yet been suggested in which, as it seems to me, the actual occurrence of the injustice

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could not always be prevented by the judge before whom the case came for trial. I am not, therefore, very much impressed with the argument of necessity or convenience, based upon the suggestion of the possibility of injustice being done.

Cases have been cited to us, such as *Gee* v. *Bell* (1) and *Tilling, Ld.* v. *Blythe* (2) and *Webster* v. *Myer* (3), in regard to which it was suggested that the judges had adopted the course of amending the Rules, or refusing to read them according to their natural sense, because they were found difficult or dangerous of application. I do not say that in *Gee* v. *Bell* (1) and *In re Hartley* (4) there are not observations in the judgments of North J. which suggest that he did take such a course. But, whatever those observations may seem to point at, in truth and in fact in each one of those cases there was no necessity to misread the rules then in question or to refuse to read them according to the natural meaning of the words, for in each one of those cases the judge might have arrived at exactly the same result by simply saying, "Although the right procedure has been taken, having regard to the words of the rules, I shall not give effect to that which has been done by ordering judgment, because I have a jurisdiction and a duty, in any case in which I think there is any probability of danger of injustice, to take care in the exercise of my discretion that there shall be personal notice or personal service of the writ upon the absent defendant before I give the judgment against him which is asked for." Moreover, in *Tilling, Ld.* v. *Blythe* (2) and *Webster* v. *Myer* (3) the Court expressly affirmed its jurisdiction.

In these circumstances, for the reasons which I have given, I think the judgment of Swinfen Eady J. is wrong. The case ought now to be restored to the list, and then the learned judge when he hears the case can, if he considers any order necessary for the protection of the defendants who have not appeared, make that order at the trial. But in my opinion he ought not to have refused to continue the hearing upon the ground that the amended writ had not been properly served.

(1) 35 Ch. D. 160.
(2) [1899] 1 Q. B. 557.
(3) 14 Q. B. D. 231.
(4) [1891] 2 Ch. 121.

ROMER L.J. I am of the same opinion; but, as the case is an important one as to practice, I think it right to state somewhat at length the reasons why in my opinion the appeal ought to succeed. Swinfen Eady J. acted, as I gather, on the view that there is a hard and fast rule without any exception that, as regards a defendant who has not appeared after due service on him of the original writ of summons, if the writ be then amended—whatever be the nature of the amendment—the amended writ must be personally served on him, and that, if that be not done, the Court has no jurisdiction to proceed with the trial of the action as against that defendant. In my opinion that view cannot be maintained. I can find nothing in the Rules or in any Act of Parliament or in any decision of the Court, nor can I see any other reason which requires personal service on an absent defendant of an amended writ in every case of amendment.

In the first place, it is clear from the Rules of Court that when a defendant has appeared personal service of an amended writ upon him is not required. It is also clear that an amended writ is not a fresh writ—a commencement of a new action—and there is in my opinion nothing in the Rules or in any Act of Parliament, nor is there any decision of the Court (and how far those decisions have gone I will consider in a moment), nor any other good reason which shews that a defendant who has not appeared is entitled as of right in every case to be placed in a different position from a defendant who has appeared with regard to an amended writ, or to require personal service of the amended writ as if it were the original writ of summons. In my opinion Order LXVII., r. 4, applies in such a case; for I think that, as regards an amended writ, personal service is, to use the words of Order LXVII., r. 5, "not required by these rules or otherwise." That being so, Order LXVII., r. 4, provides that, in the case of a defendant who has not appeared, "all writs, notices, pleadings, &c., in respect of which personal service is not requisite may be served by filing them with the proper officer." An amended writ is a writ, and, as I have already pointed out, it is not a writ which, by the Rules or otherwise, requires personal service.

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In a case in which a defendant has not chosen to appear the plaintiff is primâ facie entitled to act upon rule 4 of Order LXVII., and to file an amended writ with the proper officer; and if he does that (and the plaintiff did it in the present case), then to my mind it cannot be said that the Court has no jurisdiction to proceed with the trial of the action.

But there is undoubtedly a principle on which this Court has for long acted in mercy to a defendant who has not appeared—a principle which in favour of such a defendant trenches to a very large extent upon the Rules of Court. The Court has always borne in mind that an absent defendant served with the original writ may have acted upon the supposition that he thereby gathers substantially what the case made against him is, and relies upon it that that case and no other substantially different case will be made against him, and on that footing does not choose to appear. Accordingly the Court has refused to act upon a rule, which in terms covered a defendant who had not appeared, in cases in which the Court came to the conclusion that it would not be just to enforce the rule against such a defendant—not that the Court had no jurisdiction to proceed, but that it did not think it right to proceed in such a case.

Let me give as an instance Order XX., r. 4, which on the face of it could not be clearer. It says that "whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ," and yet it has been repeatedly held —for example, in *Gee* v. *Bell* (1)—that, when the statement of claim goes substantially beyond the indorsement on the writ in asking for relief against an absent defendant, the Court will refuse to act upon Order XX., r. 4, and will require the plaintiff, if he desires to obtain against such a defendant greater relief in substance than that which appears on the indorsement of the writ, to amend his writ and re-serve it. But that is a matter of grace. It is not that the Court has not jurisdiction, but it will not exercise the jurisdiction in such a case; and I think that is the right view to take of *Gee* v. *Bell* (1) and similar cases.

(1) 35 Ch. D. 160.

Again, it has been held in favour of a defendant who has not appeared that, if a writ be amended by altering the claim indorsed on it so as substantially to increase the claim against the defendant, the Court, in the exercise of its discretion, will not allow the plaintiff to obtain as against such a defendant the relief sought by the amended indorsement or extended claim unless the defendant be re-served personally with the amended writ. In that case again, to my mind, the Court acted on its general discretion in refusing under the circumstances to apply a rule, and not because the Court had not jurisdiction to apply it. If *The Cassiopeia* (1) be examined, it will be seen that it gives no countenance to the idea that every amended writ must of necessity be personally re-served upon a defendant who has not appeared. If you look at the judgment of Brett L.J., in which the other Lords Justices concurred, when the Court had to consider the question of re-service of an amended writ the indorsement on which had been amended, they expressly limited their view as to personal service being required to the case in which the writ is amended, as it had been in that case, by making a substantially new claim in the indorsement. The very form of the judgment in that case shews that the hard and fast rule which Swinfen Eady J. supposed to exist, and on which he has acted, cannot be maintained.

The only other authority which has been referred to is really against the present respondents, namely, *In re Hartley*. (2) I agree in thinking that that case went too far, but I do not agree that it was wrongly decided so far as it was held that the Court had jurisdiction to proceed in a proper case, even as against a defendant who has not appeared, when the plaintiff has acted on Order LXVII., r. 4, and has filed the amended writ with the proper officer. To my mind, therefore, in the present case the Court had jurisdiction to try the action, notwithstanding that the amended writ had not been re-served personally on the non-appearing defendants. But I will go so far with the respondents as to say that I can well understand how the practice of the Masters of requiring an amended writ

(1) 4 P. D. 188. (2) [1891] 2 Ch. 121.

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to be re-served in every case has grown up, and how it can to a certain extent be justified. In most cases an amendment of the writ does substantially affect a defendant, even if the amendment be only the addition of a plaintiff. There are many cases in which the effect of adding a plaintiff to a writ will be to make substantially a different case against a defendant, at any rate as regards the new plaintiff, and may make the action assume a substantially different form against that defendant. I think, therefore, that in the majority of cases —probably the great majority—a plaintiff who amends his writ will be well advised in re-serving the amended writ personally on a defendant who has not appeared.

But to my mind there are at any rate some cases in which personal service of an amended writ is not required in the true interests of the absent defendant, and in which there is no reason why the Rules of Court as they exist should not be acted upon, or why the Court should not exercise its jurisdiction and proceed to judgment at the trial of the action against the absent defendant, although he may not have been personally served with the amended writ.

Take the case, which I put in the course of the argument, of an action brought against two defendants, A. and B., asking for relief against them jointly, and also special separate relief as against B.; A. does not appear; there is an amendment of the writ asking for further relief as against B. alone, but not affecting the claim against A. at all: is there any reason why that amended writ should be personally served on A., who has not appeared? I think not.

As I have pointed out, it is not required by the Rules or by any Act of Parliament, or by any decision which is binding on us, and I can see no good reason why in such a case personal service of the amended writ should be required. Take another case, which my Lord suggested in the course of the argument, of one of the old companies suing by a public registered officer. In the course of the action that officer is changed; the writ is amended by substituting the name of the new public officer for that of the old one: is there any reason why that amended writ should be personally served on the defendant? To my

mind there is none; and, as I have pointed out, there is no hard and fast rule which requires that it should be re-served personally. In such a case again I think the Court ought to proceed with the trial of the action notwithstanding that there had been no personal service of the amended writ on the absent defendant. Other cases might of course be suggested. I have already said that in the great majority of cases the plaintiff would be well advised to re-serve his amended writ on an absent defendant; but I will say that there are at any rate exceptional cases in which the plaintiff may be able to satisfy the Court at the trial that the amendment of the writ was one which did not substantially change or affect the claim made against the non-appearing defendant by the original writ, so as to render it just that the amended writ should be re-served upon him. In such a case the plaintiff ought to be able to call on the Court to proceed with the action. The plaintiff would of course decide at his own risk for his own purposes whether the case was an exceptional one which justified him in taking that course. It might be that at the trial of the action he would fail, and the Court would still exercise its discretion if it thought the case was one in which it was not fair as against the non-appearing defendant that the action should be proceeded with, and then the Court would do what was right with regard to costs and otherwise. In the present case the learned judge has not considered the question whether in substance the absent defendants have been prejudiced by the amendment of adding a co-plaintiff. So far as I can see, and so far as counsel have made any suggestion, the addition of a plaintiff made by amendment in the present case did not substantially affect the absent defendants—that is, did not substantially change the nature of the case made against them, and was not such an alteration as in justice to them would render it requisite or proper that they should be personally re-served with the amended writ. Therefore, in my opinion the case must go back for trial. Of course this will not prevent the learned judge, when the case comes before him for trial, if he finds (contrary to what appears to me to be probably, if not almost certainly, the case) that justice does

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require that the absent defendants should be personally served with the amended writ, from requiring that to be done. As at present advised, I think the absent defendants would not be entitled to call upon the Court to take such a course. I cannot help thinking that when this action is tried out it will be found that the judge would be right in every point of view in proceeding to try it, notwithstanding that personal service of the amended writ had not been effected upon the absent defendants. For these reasons, therefore, I think the appeal ought to be allowed.

STIRLING L.J., after stating the nature of the action and the order of Swinfen Eady J., continued:—The question is whether, according to the Rules of Court, the learned judge was justified in making that order. The point which has been mainly argued before us is whether, according to the Rules of Court, the amended writ has been properly served.

I will state shortly my view upon that point, and then deal with the application of the Rules to this particular case. There is no question that the original writ in this action was properly served personally in accordance with the Rules upon the defendants who do not appear. The question is as to the service of the amended writ.

Now the amendment of a writ may, according to the Rules, take place in one of two ways: either by adding parties, or by amending the indorsement on the writ. The amendment by adding parties is governed by Order XVI., r. 11. [His Lordship read rule 11, and continued:—]

There is in that rule an explicit direction that the writ of summons shall be served on new defendants in the way pointed out by the Rules. Nothing is said as to what is to happen either when a new plaintiff is added, or as to service upon the original defendants when a new defendant is added. The rule is silent about this, and does not in terms require in the two instances which I have just mentioned that the amended writ shall be re-served personally. The second case is when the indorsement on the writ is amended. The rule which deals with that is Order XXVIII., r. 1, which provides that "the Court

or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just." And rule 10 provides that, "Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same." It is plain, therefore, from that rule that personal service of a writ amended in its indorsement is not required; what is required is simply that the amended writ shall be delivered to the opposite party. Then we come to Order LXVII., r. 4, which provides that "where no appearance has been entered for a party"—and that applies here—"all writs, (inter alia) in respect of which personal service is not requisite, may be served by filing them with the proper officer."

Now, the question to be determined is whether personal service of the amended writ is requisite in the present case. I cannot find that it is according to the Rules, and, therefore, it seems to me that, primâ facie, the proper course has been pursued, and by filing the amended writ it has been properly served upon the absent defendants.

But it is said that if full effect is given to this, which seems to me the proper construction of the rule, injustice may be done to the absent party.

I am in full sympathy with the view that the Court ought to take great care that no injustice is done to an absent party by an amendment, but I think the Rules themselves indicate the way in which injustice is to be avoided. No amendment of a writ, whether by the addition of parties or by alteration of the indorsement, can take place after service without the leave of the Court, and by both rule 11 of Order XVI. and rule 1 of Order XXVIII. the amendment is to be permitted by the judge only upon such terms as seem to him to be just. In my opinion, therefore, when an application is made for amendment, it is the duty of the judge to consider the nature of the amendment which is proposed, and if he finds that the alteration proposed, either in the constitution of the suit by the addition of parties, or in its character by the alteration of the indorsement, is such as to introduce a substantially new case

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which would not naturally be brought to the notice of the absent defendant by the original writ, it would be right for him to impose, as a term of granting leave to make the amendment, the condition that the amended writ should be personally served on the absent defendant.

But I do not think the matter stops there. I think that when the action comes on for trial the judge has still a right to deal with it in the way in which Swinfen Eady J. has dealt with the present case. If when he hears the case it appears to him that by the amendment of the writ a substantial alteration has been made in the character of the action, it is quite within his power to direct the action to stand over until the alteration which has been made has been brought to the personal notice of the defendant, so that he may have an opportunity of defending himself, if the judge thinks that substantial justice so requires.

That being so, I will now say why, with all respect to Swinfen Eady J., I think that in this case he went too far.

What is the nature of the action? The action was brought by the Jamaica Railway Company and Sir A. Hemming, who was the Governor of Jamaica at the time when the writ was issued. The Government of Jamaica claim, as appears by paragraph 40 of the statement of claim, to have some interest in the subject-matter of the action. Though Sir A. Hemming was one of the plaintiffs, he really, according to the allegations in that paragraph, represented the Government of the island. Now what has happened? Sir A. Hemming ceased to be Governor of the island, and was succeeded by Sir J. Swettenham, and thereupon an order was made giving leave to the plaintiffs to add Sir J. Swettenham as a co-plaintiff, and that is all the alteration which has been made. Now the allegation in the statement of claim is that Sir A. Hemming was suing, not in his own personal capacity, but on behalf of the Government. The Government was the real plaintiff. The same allegation is made in the amended statement of claim, and though Sir J. Swettenham has been added as a plaintiff, the real plaintiff, namely, the Government, still remains before the Court. Upon the materials before us, I am unable to see

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that there is any substantial change in the nature of the action, or that any injustice can be done to the absent defendants by allowing the action to proceed in that state of things.

I agree, therefore, with my brethren in thinking that in the present case the learned judge in his desire to protect the absent parties has gone too far. He has never exercised his judgment on the question whether injustice would be done to the absent defendants, but has acted on a supposed hard and fast rule that every amended writ must be served as if it were a new writ requiring personal service. I agree, therefore, that the order must be discharged, and the case go back to the learned judge for trial.

Solicitors: *Frank Stuttaford; Druces & Attlee.*

W. L C.

C. A. 1905 *March* 31.

In re AMBLER. WOODHEAD *v.* AMBLER.

[1901 A. 1053.]

Executor—Retainer—Loan by Wife to Husband—Wife appointed Executrix of Husband—Insolvent Estate—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.

Sect. 3 of the Married Women's Property Act, 1882, does not affect the right of retainer of a married woman who is the executrix of her deceased husband in respect of a loan made by her to him for the purposes of his business.

Though that section, in combination with s. 10 of the Judicature Act, 1875, prevents a wife from proving for such a loan in the administration of her deceased husband's estate (if insolvent) in competition with his creditors for value, yet, if she is her husband's executrix, she can as against those creditors retain the amount of the loan out of assets in her hands as executrix.

In re May, (1890) 45 Ch. D. 499, and *In re Leng*, [1895] 1 Ch. 652, followed.

APPEAL from a decision of Farwell J., the question being whether a widow, who was an executrix of her husband, was entitled to retain out of his assets a debt due from him to her

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in respect of advances made by her to him for the purposes of his business.

The action was brought by creditors for the administration of the estate of James Ambler, who died on June 5, 1901. By his will he appointed his wife and his son John Ambler executrix and executor of his will. His estate was insolvent.

The Master by his certificate allowed as a proper payment out of the personal estate the sum of 6674*l.* 8*s.* 3*d.*, which had been retained by the widow in respect of the debt owing to her by the testator.

Some creditors who had liberty to attend the proceedings took out a summons to vary the certificate by disallowing this retainer.

Farwell J., contrary to his own opinion, held that he was bound by the decision of North J. in *In re May* (1) (which had been recognised by the Court of Appeal in *In re Leng*) (2) to allow the retainer, and he dismissed the summons.

The creditors appealed.

Neville, K.C., and *E. S. Ford*, for the creditors. The question is whether s. 3 of the Married Women's Property Act, 1882, has taken away the right of a wife, who is executrix of her husband, to retain out of his assets in her hands the amount of a loan made by her to him for the purposes of his business, his estate being insolvent. It has been decided that s. 10 (3) of the Judicature Act, 1875, which applies

(1) 45 Ch. D. 499.

(2) [1895] 1 Ch. 652.

(3) Sect. 10 of the Judicature Act, 1875, provides that, in the administration of insolvent estates by the High Court, "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

By s. 3 of the Married Women's Property Act, 1882, "any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

when an insolvent estate is being administered by the High Court, has not taken away an executor's right of retainer: *Lee* v. *Nuttall.* (1) But an executor's right of retainer gives him a preference only over all creditors of an equal degree: *Talbot* v. *Frere* (2); *In re Hankey.* (3) In the case of an insolvent estate the rules of administration in bankruptcy are by s. 10 of the Judicature Act, 1875, substituted for the old rules of administration in equity. In *In re Maggi* (4) Fry J. put a limited construction upon s. 10; but his decision in that case was disapproved of by the Court of Appeal in *In re Whitaker.* (5)

The effect of s. 3 of the Married Women's Property Act is to place the debt due by a husband to his wife in an inferior class to the debts due to other creditors for value—to give those other creditors priority; and therefore, it is submitted, the executrix has no right of retainer as against them, they being creditors in a higher degree. In this way, it is contended, s. 3 has indirectly affected the right of retainer. It is true that in *In re May* (6) North J. held that, notwithstanding s. 3, a wife who was administratrix of her husband, his estate being insolvent, was entitled to retain a debt due to her from him. But that decision is not binding on this Court. In *In re Leng* (7) this point did not come before the Court of Appeal for decision; the question for decision was whether by virtue of s. 10 of the Judicature Act, 1875, s. 3 of the Married Women's Property Act applied in the administration of insolvent estates by the High Court, and the Court of Appeal held that it did. No doubt Lindley L.J. in his judgment (8) said that this conclusion was not inconsistent with *In re May* (6), and added that the Legislature had not thought fit to alter the law of retainer, and that s. 3 was not addressed to that subject. But it is submitted that those observations were obiter dicta, and that it is open to this Court to say that the law of retainer has as applying to the present case been indirectly altered,

(1) (1879) 12 Ch. D. 61.
(2) (1878) 9 Ch. D. 568, 574.
(3) [1899] 1 Ch. 541.
(4) (1882) 20 Ch. D. 545.
(5) [1901] 1 Ch. 9.
(6) 45 Ch. D. 499.
(7) [1895] 1 Ch. 652.
(8) Ibid. 657.

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because the debt due to the wife is made by that section one of inferior degree to the debts due to the other creditors for value. The effect of s. 3 is that no debt is due to the wife until the other creditors have been paid.

[VAUGHAN WILLIAMS L.J. There is a debt, but it cannot be proved.]

If this right of retainer is allowed the intention of the Legislature will be defeated, and a wife will be able to gain priority over her husband's other creditors for value. It has never before been held that an executor is entitled to retain his debt out of assets which are not applicable to the payment of that debt. The effect of the decision is really to extend the right of retainer.

It has been decided that s. 3 does not apply to a loan by a wife to her husband for purposes unconnected with his trade or business: *In re Clark.* (1)

As regards the rights of a wife as a creditor of her husband before the Married Women's Property Act, reference was made to *Slanning* v. *Style* (2); Lush on Husband and Wife, 2nd ed. p. 400; *Ex parte Wells.* (3)

[*In re Baker* (4) and *Sander* v. *Heathfield* (5) were also cited.]

Upjohn, K.C., and *Ashton Cross*, for the widow, were not called upon.

VAUGHAN WILLIAMS L.J. I think it would not be right for us to depart from that which has in my view been already decided by the Court of Appeal. Originally the point in question was decided by North J. in *In re May.* (6) In that case "a widow, the administratrix of her late husband, whose estate was insolvent, claimed to retain out of the assets come to her hands as administratrix the amount of a loan to him in his business out of her separate estate." North J. allowed that claim. The learned judge said (7): "Now, what the widow claims to do is this: she is the legal personal repre-

(1) [1898] 2 Q. B. 330.
(2) (1734) 3 P. Wms. 334, 337.
(3) (1842) 2 M. D. & D. 504.
(4) (1890) 44 Ch. D. 262.
(5) (1874) L. R. 19 Eq. 21.
(6) 45 Ch. D. 499.
(7) 45 Ch. D. 502.

sentative of the deceased; she has got into her hands assets to a larger amount than the debt which is due to her; she is not seeking to prove for her debt, but is seeking to retain it out of the assets in her hands. That right she seeks to assert cannot be denied, unless she is precluded by the two sections to which I have referred" (i.e., s. 10 of the Judicature Act, 1875, and s. 3 of the Married Women's Property Act, 1882). "But a right of retainer is not affected by the Judicature Act at all, as was decided in the case of *Lee* v. *Nuttall.*" (1) It should be observed that *Lee* v. *Nuttall* (1) was decided before the Married Women's Property Act, 1882. North J. proceeded: "It is said that the point decided there was that an executor or administrator was not a secured creditor by reason of his having a right to retain. I do not think that was the only question decided. The decision went to the extent that the section did not apply to a right to retain. James L.J. said (2): 'The sole object of the section, as it appears to me, was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt and realize his security afterwards, and to put him on the same footing as in bankruptcy, where he was only entitled to prove for the balance after realizing or valuing his security. The section was never intended to apply to retainer by an executor.'" Undoubtedly the passage which is there cited by North J. from the judgment of James L.J. is open to this observation—that the earlier part of it can no longer, having regard to the decision in *In re Maggi* (3), be considered as law. But James L.J. went on to say, "The section was never intended to apply to retainer by an executor."

The question which we have now to decide is whether s. 3 of the Married Women's Property Act was intended to apply to retainer by an executor. Now that question was discussed by the Court of Appeal in *In re Leng.* (4) That case turned upon the combined effect of s. 10 of the Judicature Act, 1875, and s. 3 of the Married Women's Property Act, 1882. The question in that case being as to a married woman's right of

(1) 12 Ch. D. 61.
(2) Ibid. 65.
(3) 20 Ch. D. 545.
(4) [1895] 1 Ch. 652.

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proof in the administration of her husband's estate for money which she had advanced to him, and the Court having arrived at the conclusion that there was no right of proof, Lindley L.J. said (1): "This conclusion" (that is, that there was no right of proof) "is not inconsistent with *In re May* (2), which was not a case of proof, but of retainer by the wife as her husband's administratrix. The Legislature has not yet thought proper to alter the law of retainer, and s. 3 of the Married Women's Property Act is not addressed to that subject." Then A. L. Smith L.J., dealing with the same point, said (3): "In the first place, I should say that I know of no case which deals with the conjoint operation of s. 10 of the Act of 1875 and s. 3 of the Act of 1882 with the exception of *In re May* (2), which was not a case, as the learned judge himself pointed out, of the widow seeking to prove, but of the right of retainer by the widow, to which s. 3 of the Act of 1882 did not apply."

In these circumstances I think this Court ought not to say that the conjoint operation of s. 10 of the Judicature Act, 1875, and s. 3 of the Married Women's Property Act, 1882, affects or alters the executor's right of retainer.

ROMER L.J. As regards the legal point which we have to decide it is admitted that, up to the passing of the Married Women's Property Act, 1882, the executrix, the widow, in such a case as the present, would have had the right of retainer. The sole point, therefore, is whether s. 3 of the Married Women's Property Act, 1882, has taken away that right. Now s. 3 is certainly not on the face of it dealing with the question of the right of retainer; it is dealing with the question of proof, and after s. 3 was passed the right of retainer might well have remained while due effect is given to the provisions of that section.

As has been pointed out by my Lord, the only question is whether you can infer, either necessarily or clearly, that the Legislature intended by s. 3 to take away that right of retainer which then existed. Lindley L.J. in *In re Leng* (1) said, with

(1) [1895] 1 Ch. 657. (2) 45 Ch. D. 499.
(3) [1895] 1 Ch. 660.

regard to that very point, that "the Legislature has not yet thought proper to alter the law of retainer, and s. 3 of the Married Women's Property Act is not addressed to that subject." A. L. Smith L.J. in his judgment said in effect the same thing; and Lord Halsbury concurred in the judgments of Lindley and A. L. Smith L.JJ.

All I can say is that I am not prepared to differ from the statements as to the effect of s. 3 made by those learned judges; and in these circumstances I think this appeal must be dismissed, with the usual result as to costs.

STIRLING L.J. I have come to the same conclusion, but simply because I defer to the law as stated by the members of this Court in *In re Leng.* (1)

Solicitors: *Johnson, Weatherall & Sturt, for Wade, Bilbrough, Tetley & Co., Bradford; Helliwell, Harby & Evershed, for Jubb, Booth & Helliwell, Halifax.*

(1) [1895] 1 Ch. 652.

W. L. C.

C. A.
1905
March 8, 9, 10; April 19.

In re ROBERTS.
ROBERTS *v.* ROBERTS.

[1903 R. 1724.]

Will—Beneficiaries—Conflicting Interests—Legal Rights—Compromise—Agreement—Family Solicitor—Common Agent—Mistake of Law or Fact—Setting aside Compromise.

A compromise between members of a family of their supposed rights under a will or other document, made after a joint consultation with the family solicitor, he acting as the common agent, is, in general, binding upon all the parties, even though it may not be quite in accordance with their exact legal rights, provided the solicitor has first fully explained to the parties what those rights are. But if any one of the parties has entered into the compromise in consequence of what afterwards proves to have been an erroneous view taken by the solicitor of the facts or of the law, or merely because the solicitor may have considered a compromise would be for the advantage of all parties irrespective of their legal rights, that party may have the compromise set aside.

Decision of Kekewich J. reversed.

Edmund Roberts, a Welsh farmer, by his will dated May 26, 1902, appointed his brother, the plaintiff William Roberts and his sister the defendant, Margaret Anne Roberts, the wife of Robert Roberts, his executors; and after directing the payment of his debts and funeral and testamentary expenses, he gave his farming stock and household effects in and about his freehold farm on which he was residing to his said sister, the defendant Margaret Anne Roberts, absolutely. And after giving two pecuniary legacies, he gave and bequeathed the residue of his personal estate unto the plaintiff and the defendant M. A. Roberts in equal shares absolutely. And he devised his said freehold farm, subject to the mortgage affecting the same, to the plaintiff absolutely; and he devised another freehold farm to a cousin absolutely.

Upon the testator's death, which happened on June 2, 1902, it was found that his personal estate was insufficient for the payment of his debts, which included mortgage debts. At that time it was supposed, though erroneously, that the testator had left, besides the real estate specifically devised, other

real estate which was undisposed of by his will and therefore descended as such. Accordingly questions arose as to the mode and the proportions in which the debts and legacies should be borne by the different parts of the estate. In these circumstances the plaintiff William Roberts and the defendant M. A. Roberts and her husband on June 4, 1902, consulted Mr. Prichard, an Anglesey solicitor, who, acting upon their instructions, obtained counsel's opinion upon the above questions. In this opinion, which was received on June 19, counsel advised that the pecuniary legacies had a right to marshal as against the (then supposed) descended real estate, and perhaps as against the specifically devised real estate, but that the authorities were not at one on the latter point; and that if any debts remained unpaid after exhausting the personal estate and the descended real estate, the specifically bequeathed farming stock and the specifically devised real estate would have to contribute rateably, unless it should be held that the charge of debts made a difference, and the question arose as to the right of pecuniary legacies to marshal as against the specifically devised real estate.

On June 20 the plaintiff and the defendant M. A. Roberts again met at Mr. Prichard's office by appointment, when, according to his evidence, he "read out the opinion to them word for word, first in English and some parts in Welsh, explaining part in Welsh clause by clause." The interview lasted about three hours, the plaintiff William Roberts and Robert Roberts, the husband of the defendant M. A. Roberts, both being much opposed to paying legacies at all, while Mrs. Roberts expressed herself anxious to pay them and so carry out the testator's wishes. After a somewhat heated discussion between the parties, Mr. Prichard suggested a compromise, and eventually he then and there wrote out a form of agreement, and read it over, as he deposed, to the parties two or three times in English and Welsh, after which it was duly signed and witnessed. Mr. Prichard further deposed that he satisfied himself that the parties, when entering into the agreement, understood everything. The effect of the agreement was that the plaintiff and the defendant Mrs. Roberts agreed to

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pay estate duties and all legacies, debts, and funeral expenses rateably, the plaintiff to pay three-fifths and the defendant Mrs. Roberts two-fifths, and the costs of administration to be borne by them in equal shares.

Mrs. Roberts subsequently ascertained, as she alleged, that the explanation given by Mr. Prichard of counsel's opinion at the interview of June 20, 1902, was erroneous, he having, as she maintained, interpreted it as meaning that, as between the specifically bequeathed farming stock and the specifically devised real estate, the pecuniary repairs, debts, and testamentary expenses might be held to be primarily payable out of the stock specifically bequeathed to her, Mrs. Roberts. She insisted that the agreement had been entered into under the mistaken impression that counsel had advised that the specifically bequeathed stock was subject to that risk; and she asserted that she would not have entered into the agreement had she correctly known the facts. The result was that she refused to carry out the agreement.

The plaintiff then brought this action against Mrs. Roberts, for the purpose of having the agreement enforced by ordering her to pay two-fifths of the estate duties, debts, funeral expenses, and legacies, and one-half of the costs of administering the estate. The two pecuniary legatees and the testator's cousin, the specific devisee of the secondly mentioned farm, were made co-defendants.

The defendant Mrs. Roberts delivered a defence, alleging her reasons, as above stated, why she ought not to be held bound by the agreement; and she counter-claimed that the agreement might be set aside altogether.

The action was tried before Kekewich J., who, in the course of his judgment, said that Mr. Prichard seemed to him not only to have filled the position of family solicitor as regarded this particular estate, but to have filled it extremely well. The parties all came before him; he endeavoured to explain to them how the matter stood; he had counsel's opinion, which, no doubt, assisted him, although, as there pointed out, there was one question of considerable doubt on the authorities. But litigation was ahead, and Mr. Prichard seemed to have a

very hesitating opinion about the incidence of the debts, which opinion must be taken to have been wrong. One did not expect the family solicitor, any more than any one else, to be always right in his opinion on the law, especially when he had a difficult will before him; and Mr. Prichard seemed also to have not had the law correctly in his head as regarded the farming stock and the personal estate. But it would be introducing very mischievous consequences if family arrangements, made after full consideration and on the best available advice at the moment, were to be upset because the person giving that advice had made a mistake.

In the result the learned judge gave judgment for the plaintiff, with costs, declaring that the agreement was binding upon the parties thereto, and that the testator's estate must be administered on that footing; and he dismissed the counter-claim with costs.

The defendant Mrs. Roberts appealed.

The appeal was heard on March 8, 9, 10, 1905.

Neville, K.C., and *Bryn Roberts*, for the appellant. The question is whether, under the circumstances, this agreement is binding on the parties. That depends on whether or not there was really a liability on Mrs. Roberts to pay part of the legacies, the question being purely one of fact. Mr. Prichard misread the opinion of counsel and told his clients that counsel had advised one thing, whereas he had really advised the opposite. That was a mistake of fact by both parties, and the agreement which was entered into on that footing cannot be sustained: *Cooper* v. *Phibbs*. (1)

P. O. Lawrence, K.C., *Micklem, K.C.*, and *R. A. Griffith*, for the plaintiff. We submit that the agreement is valid and binding upon all parties. It was a compromise arrived at by them in the presence of and after explanation by a common agent.

[EARL OF HALSBURY L.C. But Mr. Prichard advised them that the provisions of the will were governed by a state of the law which was not really the state of the law, and it was upon his wrong statement of the law that the parties entered into the agreement. In such circumstances can the agreement stand?]

(1) (1867) L. R. 2 H. L. 149.

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If the parties interested under a will or other document are advised that their rights are in doubt, as was the case here, and then they compromise, the compromise cannot be set aside, even though the advice may afterwards turn out to have been wrong. A compromise entered into before and in order to avoid litigation is binding. When entered into, as here, through a common agent, it is binding on any one of the parties, although that party may have been ignorant of his legal rights, provided there has been no fraud or improper conduct on the part of the agent: *Stewart* v. *Stewart* (1), where all the authorities were cited.

[VAUGHAN WILLIAMS L.J. In that case the House of Lords were not satisfied, upon the evidence, that there had been a mistake in law. In Williams on Executors, 9th ed. p. 1357, that case is referred to as the authority for this proposition: "It is a general principle of equity, that agreements, relative to real or personal estate, if founded on mistake, will be for that reason set aside."]

No doubt, if the compromise has proceeded on the basis of what turns out to have been a mutual mistake, it may be set aside; but that is not the case here, nor is that the case made against us. This is simply a compromise between parties of doubtful rights, in order to avoid litigation.

[EARL OF HALSBURY L.C. It may be that where a lady is represented by a solicitor who has her authority to represent her, then, if the lady does not herself understand the facts, a statement made by that solicitor binds her; but that is not the case here.

VAUGHAN WILLIAMS L.J. In *Cocking* v. *Pratt* (2) Lord Hardwicke set aside an agreement under circumstances similar to those in the present case.

EARL OF HALSBURY L.C. It seems to me here that the parties compromised upon what afterwards turned out to have been a false view of their rights.]

The validity of a compromise depends upon the facts known at the time, not on facts discovered afterwards. If the parties are fairly told at the time what the questions are and they

(1) (1839) 6 Cl. & F. 911, 957, 962, 970; 49 R. R. 267.
(2) (1750) 1 Ves. Sen. 400.

choose to settle, all standing in an equal position towards each other, and all being in equal ignorance of their legal rights, they will all be bound by their agreement: *Leonard* v. *Leonard*. (1) It is sought to set aside this agreement on the ground that the rights of the parties have been found to be different from what it was at the time thought they were; but subsequent discovery of the real rights is no ground for setting it aside. *Cooper* v. *Phibbs* (2) was a totally different case to the present: in that case there was a mistake of fact. If persons who are uncertain of their rights compromise, it does not matter what their rights are, or whether they have any or not; the compromise is binding on all: *Cann* v. *Cann* (3); *Gordon* v. *Gordon* (4); *Gibbons* v. *Caunt*. (5)

[EARL OF HALSBURY L.C. Mr. Prichard seems to have misunderstood counsel's opinion, and so did not explain what counsel advised. One of the facts we have in evidence is that, although he read the opinion, or some of it, to the parties both in English and Welsh, he did not really explain anything. He says he "explained," but he does not say how he advised or how he explained. This lady, the appellant, was entitled to have her position explained to her fully.]

Neville, K.C., in reply. The parties never really had the opinion of counsel before them at all, for Mr. Prichard misinformed his clients of the effect of it.

EARL OF HALSBURY L.C. We will consider our judgment.

Cur. adv. vult.

April 19. The judgment of the Court (Earl of Halsbury L.C., Vaughan Williams and Stirling L.JJ.) was delivered by

VAUGHAN WILLIAMS L.J., who after reading the pleadings, and stating the effect of Kekewich J.'s judgment, continued:— The learned judge has based his conclusion, as we understand, on the ground that the defendant Mrs. Roberts understood

(1) (1812) 2 Ball & B. 171, 182.
(2) L. R. 2 H. L. 149.
(3) (1721) 1 P. Wms. 723, 727.
(4) (1819) 3 Swans. 400, 463; 19 R. R. 230.
(5) (1799) 4 Ves. 840, 849.

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the opinion of counsel at the time she entered into the agreement. Now, it seems to us that in the first instance one must ascertain what the facts are as to the interview at which Mr. Prichard advised the plaintiff and the defendant at his office. [His Lordship then referred to the evidence as to what took place at the interview of June 20, 1902, and said that the Court had arrived at the conclusion, upon that evidence, that Mr. Prichard inaccurately stated the effect of counsel's opinion. His Lordship then proceeded :—]

There being then this misrepresentation of the effect of the opinion, was the agreement induced by it? We have no doubt but that the plaintiff and the defendant Mrs. Roberts, by reason of what Mr. Prichard said to them, were under a misapprehension as to the effect of the opinion. They understood that counsel had stated in his opinion that he was in doubt as to whether the specifically bequeathed personalty could be resorted to by the pecuniary legatees; but it does not follow that, because the plaintiff and the defendant Mrs. Roberts were under this misapprehension, Mrs. Roberts was thereby induced to sign the agreement. She may have been induced to sign it being perfectly conscious that there was a doubt about the incidence of the legacies upon the devised realty and the specific bequests, because she was anxious, taking a different view from the plaintiff, that the legacies should be paid in accordance with the testator's wishes, and was willing, with this object, to assume two-fifths of the payments necessary to satisfy the estate duties and legacies, debts and funeral expenses, notwithstanding the doubts as to the true effect of the will.

Generally speaking, we should be disposed to support an agreement of compromise entered into after the parties have jointly consulted the family solicitor, even though the agreement may not be quite in accordance with the rights of the parties, because we think that, generally, the very object of the compromise is to avoid the necessity of having the exact relative legal rights determined by litigation; but I cannot agree with Kekewich J. if he means by his judgment that the family solicitor is entitled to keep those consulting him in the

dark as to their rights because he thinks that it is for the advantage of all parties to compromise, and that if they knew their exact rights there would be no chance of compromise. We find it, however, very difficult to draw the inference in this case that Mrs. Roberts intended to make the agreement of compromise irrespective of her legal rights. That Mrs. Roberts wished to avoid litigation we believe; but that she was willing to compromise irrespective of her legal rights, if her solicitor advised her that such a compromise would be a good thing, we do not believe. The very object of taking counsel's opinion was to ascertain what the respective rights of herself and William Roberts and the pecuniary legatees were.

We are of opinion that the plaintiff fails in so far as he asks for the declaration against the defendants on the basis of the agreement of June 20, 1902, and that the defendant Mrs. Roberts is entitled, upon her counter-claim, to an order setting aside the agreement.

This appeal must therefore be allowed.

Solicitors: *Jaques & Co., for J. Glynne Jones, Bangor; Peacocks & Goddard, for S. R. Dew & Co., Bangor.*

G. I. F. C.

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April 7, 14.

In re COULL'S SETTLED ESTATES.

[1905 C. 497.]

Settled Land—Compound Settlement—Settlement by Will—Subsequent Settlement of other Land to same Uses subject to Incumbrance—Discharge of Incumbrance — Appointment of Trustees of Compound Settlement for Purposes of Settled Land Acts—Definition of such Trustees—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 8; *s.* 45, *sub-s.* 1—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 11, 16.

A testator by his will dated in 1870 devised a residential estate in settlement. In the midst of and surrounded by the estate and near to the mansion-house there was a smaller property which belonged to other persons. The tenant for life under the will purchased this property for 7800*l.*, and, having mortgaged it for 7000*l.*, himself providing the balance, he by deed in 1904 settled it on the subsisting uses of the will, but subject to the mortgage and to repayment to himself of his costs, charges, and expenses arising out of the transaction. It was proved that the acquisition of this additional property was most desirable and beneficial. Neither in the will nor in the deed of 1904 was any general power of sale conferred on the trustees of those instruments, but the deed contained a proviso that the trustees thereof should have power, by sale or mortgage of the property thereby assured, to raise the amount of the costs, charges, and expenses above referred to. The tenant for life applied to the Court for its sanction to his raising the amount of the incumbrance and costs, charges, and expenses by a mortgage of the entirety of the estate, and that the trustees of the deed of 1904 might be appointed trustees for the purposes of the Settled Land Acts of the settlement created by the will and the deed of 1904:—

Held, following the decision of Byrne J. in *In re Lord Stafford's Settlement and Will*, [1904] 2 Ch. 72, that the trustees of the deed of 1904 ought to be appointed trustees of the compound settlement for the purposes of the Settled Land Acts, as otherwise there would be no one to whom notice could be properly and adequately given under s. 45, sub-s. 1, of the Settled Land Act, 1882:

Held, further, that the proviso contained in the deed of 1904 had not the effect of making the trustees of that instrument trustees for the purposes of the Settled Land Acts, as those Acts contemplated trustees having a general and not a limited power, that is, a power exercisable at any time and for any purpose, and not a power exercisable in a contingency and for a particular purpose.

The application was therefore granted.

The judgment of Byrne J. (unreported, but referred to, [1904] 2 Ch. at p. 74) in the case above cited more fully referred to by Kekewich J.

ADJOURNED SUMMONS.

Robert Coull, late of North Middleton, in the county of

Northumberland, by his will dated July 21, 1870, devised all his real estates at North Middleton, in the county of Northumberland, to certain uses, under which, in the events which had happened, the applicant William Dixon Foster-Coull was tenant for life of the estates within the meaning of the Settled Land Acts, with remainder to his infant son as tenant in tail. The testator appointed John Davison and Francis Brumell to be executors and trustees of his will, but did not confer on them any power of sale over his real estates.

By a codicil to his will dated December 11, 1874, the testator appointed George Brumell to be an executor and trustee of his will in addition to John Davison and Francis Brumell.

The testator died on April 16, 1875, and his will and codicil were duly proved on July 29, 1875, by John Davison, Francis Brumell, and George Brumell.

By an indenture dated February 16, 1888, the applicant effected a mortgage of his life estate for 1800*l.*

By an indenture dated August 16, 1904, in consideration of the sum of 7800*l.*, certain freehold hereditaments and premises known as North Middleton Farm and a field adjoining in the township of North Middleton (hereafter called "the newly acquired property") were assured unto and to the use of the applicant, and by an indenture of mortgage dated August 17, 1904, the newly acquired property was conveyed to the North Eastern Banking Company, Limited, by way of mortgage for the purpose of securing to them the repayment of the sum of 7000*l.* with interest, as therein mentioned.

By an indenture of settlement dated December 5, 1904, and made between the applicant of the one part and Arthur Brumell, William Collings Sample, and Charles Herbert Sample of the other part, the newly acquired property was granted and conveyed by the applicant as settlor unto the said A. Brumell, W. C. Sample, and C. H. Sample, to hold the same, subject to the mortgage of August 17, 1904, and to the payment to the applicant of the costs, charges, and expenses incurred by him in relation to the preparation and execution of the conveyance of August 16, 1904, the mortgage of August 17, 1904, and the settlement of December 5, 1904, and in relation to the

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negotiation therefor and the carrying of the same into effect respectively, and in relation to the raising and paying of the amount so to be paid, to such uses, upon such trusts, and with and subject to such powers and provisoes, agreements, and declarations as were in and by the will of the testator Robert Coull declared and expressed of and concerning his real estates thereby devised, or such of the same uses, trusts, powers, provisoes, agreements, and declarations as should be subsisting and capable of taking effect; and the said indenture of settlement contained a power enabling the applicant to revoke the uses, &c., therein declared as therein mentioned, and also a proviso that the trustees thereof should have full power by sale or mortgage of the hereditaments and premises thereby granted or any part thereof to raise the amount of the costs, charges, and expenses above referred to. No general power of sale was conferred upon the trustees.

The newly acquired property was in or near the middle of and entirely surrounded by the estates settled by the will, and approached at one point to within twenty yards of the mansion-house. It was clearly proved in evidence that the acquisition of the newly acquired property and the throwing of it into the old settled estates was a very valuable addition and an immense improvement to the original settled property, preventing the newly acquired property being sold or used for any purpose which might prove detrimental to the original settled estate. There was an affidavit by a member of a firm of auctioneers, valuers, and estate agents stating that in his opinion the newly acquired property was worth considerably more than 7800*l.* to the owners of the old settled estates, and that it would have been most unwise to allow the first-mentioned property to fall into other hands.

This summons was taken out by the applicant to obtain the sanction of the Court to his raising by a mortgage of the entirety of the property—that is to say, both that settled by the will and the newly acquired property—the amount required to pay off the incumbrance on the newly acquired property—namely, the 7000*l.*, and interest arising upon the mortgage of August 17, 1904, and the costs, charges, and expenses above

referred to, and also the appointment if necessary of A. Brumell, W. C. Sample, and C. H. Sample to be trustees of the settlement made by the will and the settlement of December 5, 1904, for the purposes of the Settled Land Acts, 1882 to 1890.

The applicant expressed his willingness, if an order were made, to release the power of revocation reserved to him by the settlement of December 5, 1904.

The summons was adjourned into Court, and now came on for hearing.

P. O. Lawrence, K.C., and *J. M. Stone*, for the applicant, the tenant for life. The will of the testator and the settlement of 1904, made by the applicant, together constitute a "compound settlement" of the North Middleton estate. That point is expressly concluded by the decision of Romer J. in *In re Lord Monson's Settled Estates.* (1) This being so, it is competent for the applicant to exercise the power of raising money by mortgage conferred by s. 11, sub-s. 1, of the Settled Land Act, 1890; but in order that the proposed transaction may be carried out it is necessary or desirable, in the special circumstances of the case, that the sanction of the Court should be obtained, and it is submitted that it is necessary that trustees of the compound settlement for the purposes of the Settled Land Acts should be appointed. That course is in conformity with the course adopted by Byrne J. in *In re Lord Stafford's Settlement and Will.* (2) The judgment of that learned judge is not reported, but his decision is referred to at [1904] 2 Ch. 74.

It is remarkable that in each of the three cases of *In re Mundy's Settled Estates* (3), *In re Byng's Settled Estates* (4), and *In re Lord Monson's Settled Estates* (1) no appointment of new trustees of the compound settlement was made; but it would appear that in no one of these cases was the question raised. In *In re Mundy's Settled Estates* (3) there was a deed of settlement followed by a will, and it appears to have been considered by all parties that the trustees of the original settlement were the proper persons to apply capital money in the

(1) [1898] 1 Ch. 427.
(2) [1904] 2 Ch. 72.
(3) [1891] 1 Ch. 399.
(4) [1892] 2 Ch. 219.

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improvement of land comprised in the settlement. In *In re Byng's Settled Estates* (1) the existence of a compound settlement was clearly present to the mind of North J.; but it was not suggested that there was any necessity for appointing trustees of that settlement. The same observation is applicable to *In re Lord Monson's Settled Estates* (2); but in that case the same persons were trustees for the purposes of the Settled Land Acts of both the instruments which constituted the compound settlement.

Austen-Cartmell, for the infant tenant in tail. The question is whether this is in truth a compound settlement, or whether the right view is not rather that the original settlement remains and some additional land is brought into it. In *In re Lord Stafford's Settlement and Will* (3) the dispute was as to the individual persons to be appointed trustees. My only doubt, however, is whether the proposed transaction is colourable; if it is not, I have no objection to offer. [He referred also to *In re Cornwallis-West and Munro's Contract.* (4)]

Fischer Williams, for the trustees of the settlement of 1904. This settlement contains a proviso that the trustees thereof shall have full power, by sale or mortgage of the hereditaments thereby granted, to raise the amount of the costs, charges, and expenses therein referred to. It is submitted that this power is sufficient to constitute them trustees of the settlement of 1904 for the purposes of the Settled Land Acts, and also, by virtue of s. 16 of the Settled Land Act, 1890, trustees of the compound settlement.

[*Lawrence, K.C.*, referred to *In re Morgan* (5), as shewing that a power of sale for a limited purpose does not constitute trustees within the Acts, and to *In re Brown.* (6)]

If it were the practice of the Court to appoint trustees of a compound settlement in cases like the present one, the effect would be to make settled land subject to two or more titles, and to introduce confusion and difficulties among conveyancers.

(1) [1892] 2 Ch. 219.
(2) [1898] 1 Ch. 427.
(3) [1904] 2 Ch. 72.
(4) [1903] 2 Ch. 150.
(5) (1883) 24 Ch. D. 114.
(6) (1886) 32 Ch. D. 597.

April 14. KEKEWICH J. The applicant is tenant for life under the will of Robert Coull dated July 21, 1870, which devised considerable residential property situate in the county of Northumberland. This will I shall hereafter refer to as the "main settlement." He is also tenant for life under a deed of December 5, 1904, comprising a small property situate in the midst of the other large property and a desirable accretion to it. The applicant bought this property himself for 7800*l.*, and mortgaged it for 7000*l.*, part of the purchase-money, he providing the balance, and he settled the equity of redemption by this deed of December 5, 1904, whereby it was conveyed to the uses of the main settlement. I propose hereinafter to refer to this deed as "the subsidiary settlement." The avowed object of it was to enable the 7000*l.* and the amount expended on costs, charges, and expenses incurred in the acquisition of the accretion to be raised by a mortgage of the entire settled property; and to this there can be no objection, provided, of course, that the money can be properly raised in prudence and in law. There is no doubt about the prudence, of which there is convincing evidence, and the only question is whether it can be properly done in law and how. There are no trustees of the main settlement within the meaning of the Settled Land Acts, and I think, as will appear in the sequel, that there are no trustees of the subsidiary settlement within those Acts, and, a mortgage therefore being impossible without the appointment of trustees, the question is whether it will suffice to appoint trustees of either one or other of the settlements, or whether there ought to be appointed trustees of the settlement compounded of the two. The phrase "compound settlement" is not to be found in the Settled Land Acts, but has been conveniently invented to describe what is there distinctly mentioned and contemplated. The Act of 1882, s. 2, sub-s. 1, provides as follows: "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments

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any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires." Can it be said that either the main settlement or the subsidiary settlement is the settlement with which the Court is dealing in the present case? It is proposed to mortgage, not the property comprised in the main settlement or the property comprised in the subsidiary settlement only, but the entire property settled by the conjoint operation of both—that is, the property originally settled plus that subsequently settled by reference to the other. This is a distinct settlement, contemplated by the enactment quoted, and conveniently styled a compound settlement. It seems to me that, regarding the question merely as one depending on the construction of that enactment, there must be appointed trustees of the compound settlement to whom notice may be given pursuant to s. 45, sub-s. 1, and that unless trustees are appointed of the compound settlement there will be no one to whom notice can properly and adequately be given pursuant to that section.

But there are some authorities to be regarded, and they present difficulties. I will turn first to the case of *In re Lord Stafford's Settlement and Will* (1), reported only before Warrington J. It is to be regretted that the previous hearing before Byrne J. has not also been reported, for his judgment is instructive and important. In the absence of a report I must refer to that judgment (of which a copy has been furnished by the solicitor in the case) somewhat fully. The will of Lord Stafford settled certain chattels, one of which, a valuable picture, had been sold for a large sum by leave of the Court. The order giving the leave will be mentioned below. An application was then made in the matter of the will and in the matter of a settlement of lands by deed dated January 26, 1874, asking that the trustees of the deed settlement might be appointed trustees of the settlement of the heirlooms created by the will, and of the deed settlement for all the

(1) [1904] 2 Ch. 72.

purposes of the Settled Land Acts, and that the trustees of the will might be directed to transfer to the trustees to be appointed the proceeds of the sale of the picture, and that the trustees so appointed might be directed to apply the said proceeds in discharge of incumbrances affecting the inheritance of the land comprised in the deed settlement. It will be observed that the summons expressly asked for the appointment of trustees of the two instruments as one, treating them as combined for that purpose.

There was a great similarity in fact between that case and this, because the applicant was tenant for life under two separate settlements, one of which corresponded to the main settlement here and the other to the subsidiary settlement. By the first (the settlement of 1874) a residential property was assured to the applicant for life with remainders over, and by the second (Lord Stafford's will) chattels were bequeathed upon trust to permit the same to be used and enjoyed by the person who by virtue of or under the limitations of the settlement of 1874 was for the time being entitled to the lands thereby settled.

The case first came before Buckley J., who, on July 9, 1902, made an order approving a conditional contract entered into by the trustees of the will for the sale of one picture, and, after expressing the opinion of the judge that the trustees of the will were the proper persons to receive the purchase-money, ordered them thereout to pay 150*l.* for a copy of the picture and certain costs. He did not deal further with the application, and it is agreed on all hands that he did not decide that it was a case of compound settlement. The question whether it was so or not was not mooted before him. But when the summons came before Byrne J. on the further application for the appointment of trustees, he was called upon to decide that question, and he deemed himself driven to say that the settlement was a compound one consisting of the two instruments mentioned in the title of the summons, which was also the title of Buckley J.'s order. He says: "By a slip or inadvertence the trustees of the will were not appointed trustees of the combined settlement, and I cannot doubt that, had the

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point been mentioned to the judge, he would have appointed them to be such trustees." After referring to difficulties occasioned by the order for payment of the proceeds of sale to the trustees of the will and for the disposal of part thereof, he says: "but on the whole I think I can read the order as merely making the trustees of the will the first recipients for administrative purposes before payment to the trustees of the settlement, notwithstanding the direction for payment of the 150*l.*, being the cost of making a copy of the picture sold, which primâ facie ought under s. 37, sub-s. 2, to be made by the trustees of the settlement, the money not being brought into court." Byrne J. then discussed the question who were the proper persons to be appointed trustees of the settlement, that is, trustees of the compound settlement, and gave special reasons for the conclusion that in that particular case it was right to appoint the trustees of the will, notwithstanding that ordinary rules would have led to the appointment of the trustees of the deed of 1874.

It is impossible to find a more distinct decision that, in such a case as is now before the Court, an appointment of trustees of the compound settlement must be made before the application of capital money arising under the subsidiary settlement to purposes with which the main settlement is also concerned can be sanctioned. I understand the learned judge to have based his conclusion on consideration of s. 2, sub-s. 1, and s. 45, sub-s. 1, and to have decided that the settlement with which he was dealing was neither the will nor the deed, but a third distinct settlement—namely, the compound settlement. The value of his judgment on this point is enhanced by the difficulties which he entertained by reason of Buckley J.'s order being made without reference to the question whether it was essential to appoint trustees of the compound settlement, and indeed being so expressed as on one construction to point to there being no such necessity. The case came before the Court again, this time before Warrington J., and on that hearing it is fully reported in [1904] 2 Ch. 72. That learned judge had only to consider whether part of the proceeds of the sale of the picture might, under altered circumstances, which

need not be here mentioned, be properly applied in discharge of a mortgage on land settled by the deed of 1874, and he ultimately decided that this might be done. But first he refers to the hearing before Byrne J. and his order (which had not been drawn up), and he says this (1): "In the first instance the matter came before Byrne J. upon an application for the appointment of trustees of what is described in the summons as the settlement of the heirlooms created by the will and settlement. That part of the application has been disposed of by Byrne J., and I must take it that the order now to be pronounced will contain a direction that three persons, who are in fact the trustees of Lord Stafford's will, 'be appointed trustees of the compound settlement of the heirlooms and of the proceeds of sale of such of them as have been sold, created by the above-mentioned settlement and will, for all the purposes of the above-mentioned Acts.' I proceed upon the basis of that order having been made." Reference to the report will shew that the directions given by Warrington J. did in fact directly proceed on that basis, and that his order is workable only as containing directions to the trustees of the compound settlement.

It is nevertheless impossible to treat Warrington J. as having decided that there was a compound settlement, or that it was necessary to appoint trustees of it, for he of course started on the basis of Byrne J.'s order, and acted on it. The most that can be said is that he accepted Byrne J.'s conclusions as satisfactory to his own mind, and that I have reason to believe is the fact.

But there are some other authorities which require notice, and I will deal with them in chronological order. The first is *In re Mundy's Settled Estates.* (2) There lands were settled by deed in 1872, and then by will other lands and personal estate were settled to and upon the uses and trusts of the deed by reference. It was proposed to apply some of the personal estate in the improvement of the lands comprised in the original settlement, and this was sanctioned. The real question was whether the personal estate could properly be treated as

(1) [1904] 2 Ch. 78. (2) [1891] 1 Ch. 399.

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capital money for the purposes of the original settlement, and that it was held to be. But for that purpose it was necessary to consider whether the two instruments together constituted one settlement, and, although North J. thought otherwise, I read the judgments of the Court of Appeal as deciding that they did. The phrase "compound settlement" does not occur, and I doubt if the question whether it was necessary to appoint trustees of the one settlement was present to the mind of any one of the judges who heard the case. I observe that it was not suggested in argument. There were separate trustees of the original settlement and will, and it seems to have been throughout considered that the trustees of the original settlement were the proper persons to apply the money if the proposed application thereof was sanctioned. The case is no authority on the point now under discussion. The next case is *In re Byng's Settled Estates.* (1) There again the question arose whether a will and a deed settling land to the uses of the will were one settlement, and North J., following *In re Mundy's Settled Estates* (2), held that they were. He says (3): "It seems to me that for the purpose of laying out money in improvements the limitations of the two instruments taken together do form what I may call one compound settlement." He therefore had distinctly before him the notion of a settlement which was not the will or the deed, but something distinct and compounded of both. But the necessity of appointing trustees of that distinct settlement was not mooted. This probably was because the same persons were trustees of both instruments, and probably, therefore, it did not occur to any one that there might be a legal, when there was no practical, difficulty.

Romer J. had to deal with a similar case in *In re Lord Monson's Settled Estates.* (4) There an equity of redemption in one estate had been settled by reference to the limitations of another estate contained in a separate deed, and the learned judge held that moneys required to discharge the incumbrance might be raised by a mortgage on both estates. He refers to

(1) [1892] 2 Ch. 219.
(2) [1891] 1 Ch. 399.
(3) [1892] 2 Ch. 225.
(4) [1898] 1 Ch. 427.

In re Mundy's Settled Estates (1) and *In re Byng's Settled Estates* (2), and in connection with the latter uses the phrase "compound settlement"; but again the distinction between that settlement and the two of which it was compounded was not noticed, and the necessity of appointing trustees of it was not suggested. It appears from the report that by virtue of two orders of the Court the same persons were trustees for the purposes of the Settled Land Act of both instruments, so that no practical difficulty was apprehended. The result is that while I have three cases (and there may have been many more) in which the question whether trustees of the compound settlement ought to be appointed might have been raised, but was not raised, I find in no one of them any indication of opinion that such an appointment is not necessary; whereas, on the other hand, I have the fully considered opinion of Byrne J. that it is necessary, and that was acted on by Warrington J. I am told that if I adopt that opinion it will introduce confusion among conveyancers. I hope not, and I am sure that if confusion there be, they will promptly disperse it. Indeed, I venture to think that confusion is more likely to result from a different conclusion. I assume that the application of the money which the Court has in other cases sanctioned without the appointment of trustees of a compound settlement has been properly made, and that all has gone well notwithstanding that one precaution which I deem necessary has not been observed. The provisions of the Conveyancing Act, 1881, s. 70, sub-s. 1, would, as is noticed by Byrne J., assist this. But the point having been now raised a decision is necessary, and I must decide it as seems to me to be right.

In view of the above decision it is unnecessary to consider the point urged by Mr. Fischer Williams; but it is one of some practical importance, and, having formed a distinct opinion on it, I think it may be useful to express that opinion. It will be remembered that what I have styled the subsidiary settlement was really a settlement of an equity of redemption. It contains a proviso that the trustees thereof shall have full power, by sale or mortgage of the hereditaments and premises

(1) [1891] 1 Ch. 399. (2) [1892] 2 Ch. 219.

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thereby granted or any part or parts thereof, to raise the amount of the costs, charges, and expenses above referred to, being the costs, charges, and expenses incurred by the settlor in relation to the purchase of the hereditaments and premises, and for that purpose to revoke all or any of the uses or trusts applicable to the said hereditaments and premises thereunder, and to appoint or limit the same for any term or terms of years in fee simple as they or he shall in their or his absolute discretion think fit. It was argued that this was a power of sale within the meaning of the Settled Land Act, 1882, s. 2, sub-s. 8, and that therefore the trustees of that settlement were trustees of it within the meaning of the Settled Land Acts. It was further argued that if they are trustees, within the meaning of the Acts, of the subsidiary settlement, they therefore are also trustees of the main settlement, by reason of s. 16, sub-s. 1, of the Settled Land Act, 1890. I doubt this conclusion, but will say no more about it, because I do not think that they are trustees of the subsidiary settlement within the meaning of the Acts. In a note in Mr. Wolstenholme's book to the Settled Land Act, 1882, s. 2, sub-s. 8, the learned author says: "It is conceived that executors with power to sell for payment of debts are not, but that persons with a general power of sale are, trustees within this section. The power must be general." This in my judgment is correct. It may be difficult to state why the Legislature provided that trustees with power of sale and no other persons should be trustees for the purposes of the Act, especially as any principle that has occurred to me as likely to be the foundation of that enactment has been infringed by the amendment introduced by the Act of 1890, s. 16; but I think that a general power and not a limited power—that is, a power exercisable at any time and for any purpose, and not a power exercisable in a contingency and for a particular purpose—must have been intended.

There is, so far as I am aware, no authority on the point; but I was referred to *In re Morgan* (1), where the will contained a proviso that the trustees might sell and convey all or any of the settled lands in consideration of annual ground-

(1) 24 Ch. D. 114.

rents or fee-farm rents to be reserved out of or charged and secured on the hereditaments, and that there was no other power of sale. North J. held that the person entitled to the income was a tenant for life within the meaning of the Act, and appointed trustees for the purposes of the Act. This, of course, he would not have done if the trustees of the will had been already trustees for the purposes of the Act by reason of the proviso above mentioned. It was not suggested that they were.

I will therefore appoint trustees of the compound settlement for the purpose of the Settled Land Acts, and authorize them to raise by mortgage of the entire property what is required to discharge the incumbrance on the lands comprised in the subsidiary settlement together with the costs of this application, and to apply the amount raised accordingly. But this must be conditional upon the applicant releasing the power of revocation contained in the subsidiary settlement, which I understand he is willing to do.

Solicitors: *Crossman, Prichard, Crossman & Block, for Brumell & Sample, Morpeth.*

C. C. M. D.

FARWELL J.

1905

March 23.

In re TURNBULL. SKIPPER *v.* WADE.

[1905 T. 16.]

Will—Construction—Legacies given "free from Duty"—Settled Legacy—Settlement Estate Duty—Will made before and Death of Testatrix after passing of Finance Acts, 1894 *and* 1896—*Deficient Estate—Abatement of Legacies—Incidence of Duties—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 1—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-s.* 1—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.

A testatrix, who made her will in 1893 and died in 1903, bequeathed numerous pecuniary legacies and directed that all the legacies should be paid "free from duty." Her estate was insufficient to pay all the legacies and duties in full:—

Held, following *Lord Advocate* v. *Miller's Trustees*, (1884) 21 Sco. L. R. 709, that the legacy duty payable on each legacy must be treated as an additional legacy and be added to the legacy for the purposes of abatement.

The testatrix by her will settled one of the legacies on certain trusts:—

Held, that the Finance Acts, 1894 and 1896, applied, and that the direction to pay "free from duty" included the settlement estate duty, which must, like the legacy duty, be treated as an additional legacy and be added to the legacy for the purposes of abatement.

ADJOURNED SUMMONS.

Mary E. Turnbull, the wife of Francis Turnbull, by her will dated June 28, 1893, appointed her said husband and R. E. Cunliffe the executors and trustees of her will, and, amongst other pecuniary and specific legacies, she bequeathed the following legacies, namely, to her said husband a legacy of 50,000*l.*, with a declaration that if he should die before her the said legacy should not lapse but should vest in, and in that event she bequeathed the same to, his representatives to be dealt with as part of his personal estate and as if he had died immediately after her; to her nephew Frank Maddock Skipper, Arthur Hilton Skipper, and the said R. E. Cunliffe a legacy of 15,000*l.* upon trust to invest the same and pay the income thereof to her niece Harriet M. E. Skipper for life, and after her death to stand possessed of the said legacy for her children as therein mentioned. And the said testatrix

also bequeathed to Vera G. P. Skipper a legacy of 3000*l.* And the testatrix declared that all the before-mentioned legacies, as well as the other legacies bequeathed by her will, should be paid "free from duty." And the testatrix bequeathed the residue of her estate upon trust for certain persons.

The testatrix died on November 19, 1903. Both of the executors and trustees named in her will predeceased her, and letters of administration to her estate with the will annexed were granted to the plaintiff in January, 1904.

The total of the pecuniary legacies bequeathed by the will of the testatrix amounted to 123,000*l.*, and her estate was insufficient to pay these legacies in full after her debts and the duties had been discharged. The deficiency was several thousand pounds. Some of the legacies were liable to duty at the rate of 3*l.* per cent. and some at 10 per cent.

In August, 1900, Vera G. P. Skipper married a Mr. Lane, and her legacy, which was subject to legacy duty at the rate of 10 per cent., was caught by the covenant in her marriage settlement to settle her after-acquired property.

Francis Turnbull, the husband of the testatrix, died in March, 1902, having by his will made in December, 1898, bequeathed numerous legacies, and the legacy of 50,000*l.* given him by his wife would be exhausted in satisfying the legacies given by his will. All the legatees named in his will survived him and were strangers in blood to the testatrix. The Crown claimed legacy duty at the rate of 10 per cent. on the 50,000*l.* bequeathed by the will of the testatrix to her husband Francis Turnbull on the ground that under the circumstances all the legatees under his will were substituted legatees under the will of the testatrix, and for the purposes of the present summons the claim of the Crown was assumed to be good.

The questions raised by the summons were: (1.) Whether the direction to pay the legacies "free from duty" was a direction to pay the duty out of the residue (if any) available after payment of the legacies, so that, in the event (which had happened) of the estate being insufficient to pay the legacies in full, the direction as to payment of duty became inoperative: or whether the amounts of the duties payable by virtue of the

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said direction ought to be treated as legacies for the purposes of abatement between the legatees, so that the legacies ought to abate in the proportion which the fund available for the payment of legacies bore to the sum total of the legacies and the duties payable in respect of them. (2.) Whether the direction that the legacies should be paid "free from duty" referred to the legacy duty only, or related also to settlement estate duty, and was an "express provision to the contrary" within the meaning of s. 19, sub-s. 1, of the Finance Act, 1896.

Maugham, for the plaintiff.

Upjohn, K.C., and *R. J. Parker*, for the trustees of a settled legacy which was liable to legacy duty at the rate of 3 per cent. The first question is as to the incidence of the legacy duty. It is submitted that where there is a direction to pay legacies "free from duty" and the estate is insufficient, the direction to pay is inoperative, and each legacy must bear its own duty: *Wilson* v. *O'Leary*. (1)

Jessel, for a legatee in the same interest.

Butcher, K.C., and *Austen-Cartmell*, for the executors of the husband. In the Scottish case of *Lord Advocate* v. *Miller's Trustees* (2) it was held that where a legacy is left free of duty, but there is no fund available for payment of the duty, the legatee is liable in duty on the amount of his legacy, including the portion thereof to be applied in payment of duty, the duty being in itself an additional legacy.

Jenkins, K.C., and *Beebee*, for the trustees of Mrs. Lane's marriage settlement. We contend that the duties should be paid first out of the residue, and then the balance should be apportioned: *In re Wilkins*. (3)

Butcher, K.C. The cases of *Noel* v. *Lord Henley* (4) and *Farrer* v. *St. Catharine's College, Cambridge* (5), also support our contention.

FARWELL J. As I have formed an opinion on this point, I will deal with it first. The legacies in question are given "free

(1) (1874) L. R. 17 Eq. 419.
(2) 21 Sco. L. R. 709, 711; 11 R. 1046, 1052.
(3) (1884) 27 Ch. D. 703, 706.
(4) (1819) 7 Price, 241, 253; 26 R. R. 660.
(5) (1873) L. R. 16 Eq. 19, 25.

from duty." Of the legacies given some bear 10 per cent. duty and some 3 per cent. duty. The estate is insufficient to pay the whole amount. The judgment of the Lord Ordinary in *Lord Advocate* v. *Miller's Trustees* (1) seems to me to express the true view with great accuracy. He says: "The present is a case where all the legacies are duty free, although there are some of them in regard to which the duty is 10 per cent. and others only 3 per cent. How, then, in the case of a deficiency to meet the legacies in full, are the claims of the Crown and of the various legatees adjusted, for the claims of all must be abated and duty only paid upon the sum actually distributed. Thus, suppose the legacy is one of 100*l.*, upon which 10 per cent. is payable, and declared to be duty free. This is in reality a legacy of 110*l.* But if the estate can only pay one-half of the legacies, the amount to this legatee would only be 55*l.*—10 per cent. on which must go to the Crown, or 5*l.* 10*s.*—thus reducing the sum actually receivable by the legatee to 49*l.* 10*s.* So, in like manner in the case in which 3 per cent. alone is exigible,—this, if duty free, is a legacy of 103*l.*, but if the estate can only pay one-half of the legacies, then the nominal amount is 51*l.* 10*s.*, 3 per cent. on which is 1*l.* 10*s.* 11*d.*—leaving the actual sum receivable 49*l.* 19*s.* 1*d.* The Crown obtains its duty on the abated sum paid to the legatee, and the legacy duty comes off the legacy itself, in respect that there is no other fund from which it can be paid." Of course, the Scottish decision is not binding upon this Court, but it appears to me to be common sense and justice, and I desire respectfully to adopt it. With regard to the English authorities, there is, first, the case of *Noel* v. *Lord Henley* (2), where Richards C.B. says: "Legacy duty is a charge upon the legacy, not upon the estate; but where the legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the same fund." And then in *Farrer* v. *St. Catharine's College, Cambridge* (3), Lord Selborne, dealing with a case where there was a deficient estate, and a direction that all the legacies were to be paid free of duty, held that the duty on a specific or pecuniary

(1) 21 Sco. L. R. 709, 711. (2) 7 Price, 241, 253; 26 R. R. 660.
(3) L. R. 16 Eq. 19, 25.

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legacy is to be treated itself as a pecuniary legacy, and must abate accordingly. Unfortunately, *Farrer* v. *St. Catharine's College, Cambridge* (1), was not cited to Pearson J. in *In re Wilkins* (2); but, if I understand his judgment aright, I agree with his statement of the principle to be applied, although I venture to differ from the arithmetic which he deduces from that principle. It appears to me that he has not carried out what he says is the principle. He says: "I think the intention of the testator was that each annuitant should receive that exact proportion of his estate which she would have received if the estate had been sufficient to pay both the annuities in full," that is, if the estate had been sufficient to pay both the annuities and the duty in full, for the duty is in itself either an addition to the legacy or an additional legacy, and must abate accordingly. It follows that the legacy duty must be treated as an addition to each legacy, and then all the legacies will abate rateably, and each of the abated legacies will bear its own duty.

The second question was then argued.

Upjohn, K.C., and *R. J. Parker*. The will was made in 1893, and the first point is whether the Finance Acts apply. No doubt in *Jones* v. *Ogle* (3) Lord Selborne expressed a doubt whether an Act would apply to a will made before the passing of the Act, but in *In re Bridger* (4) the distinction is pointed out between the difference of an Act dealing with the construction of wills and an Act that makes an alteration in the law which affects the operation of wills. Here the Finance Acts apply. The next question is whether the words "free from duty" include the settlement estate duty. We submit they do. The effect of the Finance Acts is to enlarge the meaning and operation of the will, and the words in question are intended to include all duties payable in respect of the legacy. The fact that new duties were imposed after the making of the will does not prevent that construction. "Free from duty" means free from any duty. The intention is to give the legacy clear of all duties.

(1) L. R. 16 Eq. 19.
(2) 27 Ch. D. 703, 706.
(3) (1872) L. R. 8 Ch. 192, 195.
(4) [1894] 1 Ch. 297.

[FARWELL J. referred to *In re Maryon-Wilson.* (1)]

The cases are collected in Theobald on Wills, 6th ed. pp. 192-3. *In re Pimm* (2) seems to be the nearest case to this.

[FARWELL J. referred to *In re Lewis.* (3)]

In *In re Cayley* (4) Swinfen Eady J. followed *In re Pimm* (2) and not *In re Lewis.* (3)

Jenkins, K.C., and *Beebee.* The Finance Acts do not apply: *In re March.* (5) But if they do, s. 5, sub-s. 1, of the Act of 1894, and s. 19, sub-s. 1, of the Act of 1896 make the settlement estate duty a charge on the legacy unless the will contains "an express provision to the contrary." There is no provision here for payment of this duty out of the residue, and that is a sufficient contrary intention for the purposes of the Finance Acts. *In re Pimm* (2) and *In re Cayley* (4) are decisions on wills made after the passing of those Acts. Here it is clear that the testatrix only referred to legacy duty at the date of her will. The nature of settlement estate duty is pointed out in *In re Maryon-Wilson.* (1) It is made payable by the executor to assist the Crown, but the executor does not pay it, quâ executor, out of the testator's estate. He pays it out of the legacy as trustee for the legatee. The legacy is severed from the estate in the hands of the executor, and it would require a further direction in the will to make the settlement estate duty payable out of the general estate.

Butcher, K.C., and *Austen-Cartmell.* It is to our interest to support the contention of Mr. Jenkins on this point. The question really turns on s. 19 of the Act of 1896. Is there an express provision to the contrary? The same words occur in s. 14 of the Act of 1894, and have been construed in *In re Parker-Jervis.* (6) We submit that in this will there is not a definite indication to the contrary. "Free from duty" is not sufficient. If the words had been "free from all duties" they might have been sufficient.

[They also referred to *In re Rayer.* (7)]

Jessel, for a legatee in the same interest.

(1) [1900] 1 Ch. 565, 570.
(2) [1904] 2 Ch. 345.
(3) [1900] 2 Ch. 176.
(4) [1904] 2 Ch. 781.
(5) (1884) 27 Ch. D. 166, 169.
(6) [1898] 2 Ch. 643.
(7) [1903] 1 Ch. 685.

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FARWELL J. The testatrix in this case has declared that all the legacies shall be paid "free from duty." Her will was made in 1893. The question I have to determine is whether the settlement estate duty, which is leviable under the Finance Act, 1894, s. 5, and, by s. 19 of the Act of 1896, is made payable out of the legacy which is settled, unless the will contains an express provision to the contrary, is payable in this case out of the general estate under the direction contained in the will, or whether it is to be borne by the legacy. That depends on the question whether the will contains "an express provision to the contrary." The first point taken is that this will is dated before the Finance Act, 1894; and it is said that I should have regard to that Act in construing the meaning of the word "duty." I think the cases which have been cited establish that if it is a question of construction as regards the donees of the gift, as in *In re March* (1), the Act does not affect the meaning at all; but if it be a question of the description of the subject-matter of the gift, then s. 24 of the Wills Act requires that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. That section, in the case of *In re Bridger* (2), was applied so as to make a gift of such part of the testator's residuary trust estate as might by law be given to charitable purposes take effect, by reason of the subsequent Mortmain Act of 1891, with respect to a larger amount of property than it would have done at the time the will was made. Davey L.J. in his judgment points out (3) the distinction between the description of the property and the construction of the gift. Having regard to those decisions, and to the conclusion I have come to on the former part of the case that a gift free from duty is, in effect, a legacy of the duty, I consider that *In re Bridger* (2) governs this case, and I have to read the will, having regard to s. 24 of the Wills Act, as though it had been made just before the death of the testatrix. Then I find the testatrix giving this settled legacy "free from duty." I do not see how I can spell out of that anything other than

(1) 27 Ch. D. 166. (2) [1894] 1 Ch. 297. (3) [1894] 1 Ch. 302.

what it says, namely, that the legacy is to be paid free from duty. The settlement estate duty is charged upon the legacy, no doubt, in a sense, but the executors have to pay it before they pay over the legacy, and they do so as a matter of practice. Not only are they required to retain, but for their own protection they do retain, the duty before they pay over the legacy. I cannot myself see any reason for saying that "free from duty" means free from one kind of duty payable by the executors more than from another kind of duty so payable. If the executors have to pay the duty before they hand over the legacy, they cannot pay over that legacy free from duty unless they have first discharged the duty out of the general estate. If they pay it over less the duty, then they pay over less than they are directed to pay. If they have to pay it over subject to duty, and if the property is charged with the duty, they only pay over the balance after payment of duty. I can see no means by which I can restrict the generality of the word "duty." Kekewich J. in *In re Parker-Jervis* (1), where the question was whether the words "without any deduction" included exemption from estate duty, has pointed out that it is not necessary to use the words "estate duty" in order to find an "express provision to the contrary," nor do I think it would be possible so to hold in the face of the other authorities. "Without any deduction," for instance, does not refer in express words to settlement estate duty, but the Court of Appeal in *In re Maryon-Wilson* (2) held that settlement estate duty was to be paid out of a testator's general estate under his covenant to pay a sum of money "without any deduction." I cannot draw any distinction which is satisfactory to myself between the words "without any deduction" and "free from duty." I therefore hold that the settlement estate duty in respect of the settled legacy is also payable out of the general estate, and must, like the legacy duty, be also treated as an additional legacy and be added to the legacy for the purpose of abatement.

Solicitors: *Busk, Mellor & Co.; Corbould, Rigby & Co.; Campbell Wade.*

(1) [1898] 2 Ch. 643, 653–4. (2) [1900] 1 Ch. 565, 570.

H. L. F.

BUCKLEY J.

1905

April 7.

In re TAYLOR'S TRUSTS. MATHESON *v.* TAYLOR.

[1905 T. 369.]

Company—Bonds bearing Interest out of Profits—Deficiency in Interest—Sale of Bonds—Tenant for Life and Remainderman.

Second mortgage 6 per cent. gold bonds of a Mexican railway company contained a promise by the company to pay the principal secured in 1917, and interest thereon, "accumulative, at the rate of 6 per cent. per annum" on March 1 and September 1 in each year, "upon surrender of the annexed coupons, as and when earned, out of any net earnings of any year remaining after interest" on the company's first mortgage bonds had been paid for such year, and provided as follows: "If in any year the net earnings so remaining available for payment of interest upon the" second mortgage bonds "shall not be sufficient to pay such interest in full, there shall be paid any part thereof earned and available, and any deficiency shall not be waived, but shall be paid to the holder hereof out of the net earnings of any subsequent year or years, as and when there shall be any net earnings available for such purpose."

By a settlement made in May, 1899, some of the second mortgage bonds were settled upon trust to pay the income to M. for life, and after her death to her husband, T., for life, and after the death of the survivor, if T. survived her, in trust for the next of kin (excluding T.) of M.

Interest less than 6 per cent. per annum was paid on the bonds down to 1901, and no deficiency of any year was ever made up out of the earnings of any subsequent year or otherwise.

In March, 1902, the bonds, with the coupons, were sold by the trustees for 2700*l.*, and in May, 1902, M. died leaving T. surviving her, and he was her legal personal representative:—

Held, that T. was not entitled to any part of the 2700*l.* as representing the apportioned amount in respect of any deficiency of interest in M.'s lifetime, but that the whole of the 2700*l.* went to M.'s next of kin.

By an indenture of settlement dated June 23, 1892, the funds mentioned in the 4th schedule thereto were settled upon trusts in favour of Miss Hilda Nora Grace Matheson (as she then was) and her husband, issue, kindred, and next of kin, power being thereby given to the trustees of the settlement, in their uncontrolled discretion, at any time prior to and in contemplation of Miss Matheson's marriage to settle all or any of the said funds upon such trusts as the trustees might think fit for

the benefit of Miss Matheson, her intended or any future husband, and any children or more remote issue of hers, and with such ultimate trusts as the trustees might think fit.

The 4th schedule included twenty subsidy bond certificates of $1000 each of the Mexican National Railroad Company. Each certificate represented 500 A bonds and 500 B bonds. The bonds formed part of an issue of second mortgage 6 per cent. gold bonds created by the company in 1886, on which interest was to run from January 1, 1887, of which one half was in A bonds and the other half in B bonds. No interest was ever paid on the B bonds.

The A bonds contained a promise by the company to pay the principal to the bearer or registered owner in 1917, and interest thereon from January 1, 1887, "accumulative, at the rate of 6 per cent. per annum in gold coin on the 1st days of March and September in each year, upon surrender of the annexed coupons, as and when earned, out of any net earnings of any year remaining after interest on said company's first mortgage bonds outstanding shall have been paid for such year, and if in any year the net earnings so remaining available for payment of the interest upon the bonds of this series A shall not be sufficient to pay such interest in full, there shall be paid any part thereof earned and available, and any deficiency shall not be waived, but shall be paid to the holder hereof out of the net earnings of any subsequent year or years, as and when there shall be any net earnings available for such purpose." The bonds also contained the following provision: "The coupons hereto shall not bear interest, and no distribution of net earnings by way of partial payment thereon shall be obligatory on the company at any time, unless the amount available shall at that time be equal to 1 per cent. upon all the outstanding bonds of this series." Each coupon stated that the company would pay to bearer a certain sum "being six months' interest" on the bond, "such interest to be payable only as and when earned out of any net earnings available therefor, as provided in the mortgage."

Some of the bonds having been paid off, the residue of them, representing $17,000, were by a settlement dated May 12, 1899,

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made prior to the marriage of Miss Matheson and Walter Taylor, settled upon trust to pay the income to Mrs. Taylor for life, and after her death to pay the income to Walter Taylor for his life, and after the survivor's death, in trust for such persons as Mrs. Taylor should by will appoint, and in default of appointment, if Walter Taylor survived his wife, in trust for the persons who under the statutes for the distribution of the effects of intestates would on her decease have been entitled thereto if she had died possessed thereof intestate, and without having been married.

Other bonds were paid off in the lifetime of Mrs. Taylor, who died on May 22, 1902, intestate and without having had any issue, and Walter Taylor took out letters of administration to her estate.

The only interest paid on the A bonds was as follows:—

2 per cent. in March, 1893.

1 per cent. in April, 1895.

1½ per cent. in April, 1896.

3 per cent. in April, 1897.

3½ per cent. in April, 1898, and May, 1899.

4½ per cent. in May, 1900, and 1901.

The remaining bonds were sold by the trustees on March 8, 1902 (in Mrs. Taylor's lifetime), for 2700*l.*

An originating summons was taken out by the trustees, to which Walter Taylor, the surviving husband, and T. G. Matheson, one of Mrs. Taylor's next of kin, were defendants, asking for the determination of the question whether any and if any what part of the 2700*l.* was payable to W. Taylor as legal personal representative of his late wife, as representing arrears of interest upon such of the bonds as bore cumulative interest.

Howard Wright, for the trustees, stated the facts of the case to the Court.

Buckmaster, K.C., and *George Lawrence*, for Walter Taylor. The question is, What part of the 2700*l.* is income accruing since 1892? The interest has never been paid in full since that year, and the deficiency of each year since that year is

income due if not yet payable by the company. The deficiency is, by the express terms of the bond, not to be waived, and cannot be disregarded when a sale of the bonds with coupons is made for a lump sum. That sum is insufficient to pay both principal and interest; but some part must be attributed to the right or possibility of receiving the deficiency of income, and the surviving husband is entitled to have an apportioned part in respect of deficiency of income paid to him: *In re Atkinson.* (1)

Astbury, K.C., and *Stirling*, for the next of kin. This is not a case of an amount of interest legally accruing. There was in respect of the deficiencies in each year no legal debt in respect of which the tenant for life could have recovered against the company. The bonds never carried interest in the ordinary sense of that being a debt, but only gave a right as against the profits, if any. As there were no profits to pay for the deficiencies of interest, no part of the 2700*l.* is attributable to the deficiencies.

This case is really the converse of *Bouch* v. *Sproule.* (2)

[They also referred to *In re Armitage.* (3)]

BUCKLEY J. The bonds as to which the question arises in this case were the subject of a tenancy for life which came to an end on May 22, 1902. It is admitted that down to that date there were not in existence any earnings such as are referred to in the bonds; in other words, it is admitted that the fund out of which the interest was to be paid was at that time non-existent. The question is whether in that state of things the tenant for life is entitled to any and what part of a sum of 2700*l.* for which the bonds have been sold. It is obvious that that purchase price included all expectation of everything which was to come under the bonds. It included arrears—if that word can be used in any proper sense—of interest on the bonds as well as principal money in respect of the bonds; and, if there were arrears which accrued during the currency of the tenancy for life, I have no doubt that an

(1) [1904] 2 Ch. 160. (2) (1887) 12 App. Cas. 385.
(3) [1893] 3 Ch. 337, 346.

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apportioned part of the purchase price ought to be paid to the tenant for life. But in my judgment there were no such arrears.

The question falls to be decided, I think, on the examination of the bond. The bond was one under which interest was to be paid, as and when earned, out of any net earnings of any year remaining after paying certain interest on the first mortgage bonds, so that the interest was payable only out of a fund, and as and when that fund came into credit. It seems to me to be plain from that that until there was a fund there was no debt at all in respect of the interest. The bond went on to provide that, if in any year there should be any net earnings available for payment of the interest, "there shall be paid any part thereof earned and available, and any deficiency shall not be waived, but shall be paid to the holder hereof out of the net earnings of any subsequent year or years." The coupon which is attached to the bond is, if it be possible, more plain, and is an express obligation to pay the bearer six months' interest, "such interest to be payable only, as and when earned, out of any net earnings available therefor." It seems to me that under that instrument there was no interest payable at all as income of a year in which there was no fund available for its payment.

Suppose that in the year 1904 there was no fund available, and the tenant for life died on December 31, 1904. There was no income, I apprehend, payable to that tenant for life, because the obligation is to pay out of a fund, and there was no fund. If in the year 1905 a fund came into existence, the interest calculated for the year 1904 would be payable, I agree; but it would be income of the year 1905, and not income of the year 1904. And if a second tenant for life were in the enjoyment of the property in 1905, that tenant for life, and not the previous tenant for life, would, it seems to me, take that interest.

It all turns on this—that there is no obligation in this instrument to pay interest in any event; there is only an obligation to pay interest out of a fund, and there is no obligation to pay until there is such a fund; and if there be not such a fund

during the existence of the tenancy for life, then the tenant for life, as it appears to me, is not entitled to any interest.

Under those circumstances, it seems to me, the tenancy for life, which came to an end on May 22, 1902, down to which date there was no fund, is not entitled to anything in respect of income.

Therefore, the sum which has been received for purchase-money is not apportionable.

Solicitors for plaintiffs and defendant Matheson: *Freshfields.*
Solicitors for defendant Taylor: *Hind & Robinson.*

F. E.

HUMPHREYS *v.* MORTEN.

[1904 H. 3984.]

Landlord and Tenant—Forfeiture—Ejectment—Mortgagee of Underlease—Relief—Parties—Costs—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *ss.* 210, 211, 212—*Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 1.

A lessor having ejected an underlessee for non-payment of ground-rent, mortgagees by sub-demise of the underlease applied for relief under the ordinary equitable jurisdiction and the Common Law Procedure Acts, claiming a direct lease for their mortgage term, on the usual conditions.

The lessor opposed the application on the ground that the lessee and the assignee of the head lease were not parties, and on other grounds which failed.

It appeared that the lease had been assigned by the lessee's trustee in bankruptcy twenty-seven years ago, and that the assignee had not been heard of for twenty-six years, and could not be traced:—

Held, that the above circumstances afforded sufficient reason for not making the lessee and assignee parties as primâ facie required by *Hare* v. *Elms*, [1893] 1 Q. B. 604, and that the mortgagees were entitled to the relief claimed:

Held also, that the mortgagees must pay the costs of the action, except so far as they had been increased by the lessor resisting their claim to relief, which increased costs must be paid by the lessor.

Howard v. *Fanshawe*, [1895] 2 Ch. 581, 592, followed.

Newbolt v. *Bingham*, (1895) 72 L. T. 852, distinguished.

WITNESS ACTION.

This was an action by mortgagees of an underlease for relief from forfeiture for non-payment of ground-rent.

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By a lease dated May 1, 1872, and made between the present lessor's predecessors in title of the first part, a mortgagee of the second part, and the lessee of the third part, a certain messuage was demised to the lessee for ninety-nine years from June 24, 1870, at the rent of 6*l.* 10*s.* per annum, with the usual proviso for re-entry on non-payment of rent or breach of covenants. The insurance was borne by the lessee.

In 1877 the lessee's affairs were liquidated by arrangement and a trustee appointed, and on March 26, 1878, the trustee and others assigned the term to an assignee.

On June 23, 1879, the assignee mortgaged the premises to certain mortgagees for the residue of the term (less one day). The assignee shortly after disappeared, and had not since been heard of. None of his relatives knew where he was, and he could not be traced.

The sub-term or underlease was subsequently sold under the statutory power of sale, and after divers mesne assignments was assigned to Burch.

On March 1, 1899, Burch (hereinafter called the mortgagor) mortgaged the premises to the plaintiffs' predecessors in title for the residue of the original term (less three days). He afterwards charged them in favour of some second mortgagees.

On November 16, 1904, the lessor obtained possession of the premises in execution of a judgment of ejectment against the mortgagor for non-payment of rent, and relet the premises to the tenant in occupation.

The plaintiffs, who knew nothing of the ejectment proceedings until November 17, 1904, commenced this action on December 8, 1904, against the lessor, the mortgagor, and his second mortgagees for relief under the ordinary equitable jurisdiction and the Common Law Procedure Acts, claiming that upon payment of the arrears of rent and the costs of the ejectment action, and such of the costs of this action as the Court should direct, and the costs of the forfeiture and reletting, and certain insurance premiums that had been paid by the lessor, they were entitled to a lease from the lessor for their mortgage term subject to the existing tenancy, and with similar covenants as in the lease.

The lessor objected (inter alia) that the lessee and the assignee of the head lease were necessary parties, and that in their absence no relief could be given under the ordinary equitable jurisdiction or the said Acts.

Johnston Edwards, for the plaintiffs. The plaintiffs cannot obtain relief under the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 4, as the lessor has re-entered, and is no longer "proceeding by action or otherwise to enforce a right of re-entry or forfeiture": *Rogers* v. *Rice* (1), decided on the similar words of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, sub-s. 2.

The plaintiffs, therefore, ask for relief under the ordinary equitable jurisdiction as confirmed by the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), ss. 2, 3, 4, re-enacted by the Common Law Procedure Act, 1852, ss. 210, 211, 212, and extended by the Common Law Procedure Act, 1860, s. 1.

It is suggested, in reliance on *Hare* v. *Elms* (2), that the lessee and the assignee of the head lease ought to be parties. But the rule is not imperative: *Gray* v. *Bonsall* (3); *Howard* v. *Fanshawe* (4); and as it is not sought to set up the head lease their presence is unnecessary: *Gray* v. *Bonsall*. (3)

In any case the fact that the lease was assigned by the lessee's trustee in bankruptcy, and that the assignee has disappeared for twenty-six years, is a good excuse within *Hare* v. *Elms* (2) for not making them parties.

Eve, K.C., and *Jason Smith*, for the lessor. Relief under the old law involves the restoration of the head lease, so that the lessee and assignee are necessary parties: *Gray* v. *Bonsall* (5); *Hare* v. *Elms*. (2)

[SWINFEN EADY J. referred to *Doe* v. *Roe*. (6)]

That case was distinguished by both judges in *Hare* v. *Elms*. (7)

S. R. Earle, for the second mortgagees, and *W. A. Peck*, for the mortgagor, consented to the application.

(1) [1892] 2 Ch. 170.
(2) [1893] 1 Q. B. 604, 607, 611.
(3) [1904] 1 K. B. 601, 608, 609.
(4) [1895] 2 Ch. 581, 589.
(5) [1904] 1 K. B. 606.
(6) (1811) 3 Taunt. 402.
(7) [1893] 1 Q. B. 608, 611.

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SWINFEN EADY J. (after stating the facts). It is contended that, having regard to the decision in *Hare* v. *Elms* (1), relief cannot be given in the absence of the original lessee and the assignee. Now it was pointed out by Day J. in that case that where lessees or others are claiming relief "they must bring the proper parties before the Court, or give some good excuse for not having done so"; and Collins J. in concurring said: "I am therefore of opinion that the relief asked for should not be given in the absence of the first lessee; and, no reason having been given by the applicants for not making him a party to the proceedings, this application should be refused."

The application was refused on the ground that, as the renewal of the forfeited lease would reimpose a liability on the lessee, it ought not to be renewed in his absence and without giving him the opportunity of being heard.

In the present case the circumstances are such that sufficient reason is given for not making the lessee or assignee a party. The original lessee became a bankrupt, and the lease was assigned by his trustee. There is, therefore, no necessity to make him a party.

The assignee, on the other hand, has disappeared for some twenty-six years. None of his relatives know where he is, and he cannot be traced. I think that is sufficient reason for not making him a party.

[After holding that the lessor's other objections failed, his Lordship continued:—]

The plaintiffs are, therefore, entitled to the relief claimed, subject only to the question of costs, on which I will hear the parties.

Johnston Edwards, for the plaintiffs. The plaintiffs must, no doubt, pay for their relief, but they ought not to bear the costs of objections that have failed.

The proper order is that the plaintiffs must bear the costs of the action except so far as they have been increased by the lessor resisting their claim, and those costs must be borne by the lessor: *Howard* v. *Fanshawe*. (2) The plaintiffs have

(1) [1893] 1 Q. B. 604, 607, 611. (2) [1895] 2 Ch. 581, 592.

agreed to pay the costs of the second mortgagees, and the mortgagor does not ask for costs.

Eve, K.C., for the lessor. The plaintiffs must pay the entire costs as between solicitor and client: *Newbolt* v. *Bingham.* (1)

Johnston Edwards, in reply. That was a mortgagee's action for relief from forfeiture for non-payment of rent, and until the appeal the mortgagee had refused to give any security for doing certain repairs required by the covenants of the lease. The lessor rightly insisted that this was a necessary condition of relief, and the mortgagee had therefore to bear the costs.

SWINFEN EADY J. I must follow the order in *Howard* v. *Fanshawe.* (2) The plaintiffs must pay the costs of the action except so far as they have been increased by the lessor's resisting their claim to relief. The lessor must pay those increased costs, with the usual set-off.

The plaintiffs are clearly bound to pay the costs of obtaining relief: *Croft* v. *London and County Banking Co.* (3); but not the costs as increased by the resistance to that relief.

Newbolt v. *Bingham* (4) was a case where the mortgagee had refused in the Court of first instance to concede the necessary condition of relief—namely, to give security for doing the repairs. A. L. Smith L.J. said: "I only wish to say that I think that the appellant has come up to the Court of Appeal with an entirely new case. I have no doubt that, if the mortgagee had asked for it, he could have got relief from the judge at chambers on the same terms as he gets it here."

No such considerations arise in the present case, and I therefore follow the order in *Howard* v. *Fanshawe.* (2)

Solicitors: *Joseph Pearce; Morten, Cutler & Co.*

(1) 72 L. T. 852.
(2) [1895] 2 Ch. 581, 592.
(3) (1885) 14 Q. B. D. 347.
(4) 72 L. T. 853.

G. R. A.

SWINFEN EADY J.

1905

April 7, 13.

PRICE *v.* JOHN.

[1904 P. 1274.]

Deed—Operation—All Estate Clause—Conveyance by Husband and Wife of Moiety of Wife's Land—Husband's Rent-charge not mentioned—Release or Grant—Law of Property Amendment Act, 1859 (22 & 23 *Vict. c.* 35), *s.* 10.

By a voluntary settlement of 1868 a husband and wife and each of them did "grant release dispose of and confirm" a moiety of the wife's hereditaments "and all the estate right title interest property claim and demand" of either of them in, to, and out of the same to trustees and their heirs on certain trusts.

The husband was entitled to a rent-charge issuing out of the hereditaments, but it was not mentioned in the settlement. The settlement contained no covenants for title:—

Held, explaining and applying *Drew* v. *Earl of Norbury*, (1846) 9 Ir. Eq. Rep. 171, 177; 3 J. & Lat. 267, 284; 72 R. R. 62, and *Johnson* v. *Webster*, (1854) 4 D. M. & G. 474, 488, that the settlement operated by way of release and not by way of grant of the rent-charge, and that as the husband and wife, the owners of the unsettled moiety of the hereditaments, had concurred, that moiety, by virtue of the Law of Property Amendment Act, 1859, s. 10, remained subject to the entire charge.

Booth v. *Smith*, (1884) 14 Q. B. D. 318, 321, followed.

ACTION.

On February 14, 1863, a husband purchased a rent-charge of 70*l.* issuing out of certain hereditaments belonging to his wife, and the rent-charge was conveyed to him in fee simple.

By a voluntary settlement dated December 29, 1868, and made between the husband and wife of the first part, a grantee to uses of the second part, and trustees of the third part, after reciting that the husband and wife were seised of the said hereditaments in fee simple in right of the wife and were desirous of settling a moiety thereof as thereinafter declared, it was witnessed that the husband and the wife (with the husband's concurrence testified by his execution thereof) did and each of them did by those presents intended to be acknowledged by the wife "grant release dispose of and confirm" unto the grantee and his heirs one moiety of the said hereditaments "and all the estate right title interest property claim and

demand whatsoever" of the husband and wife or either of them in, to, and out of the same premises and every part thereof, to hold the said moiety of the said hereditaments and premises unto the grantee and his heirs to the use of the trustees and their heirs upon the trusts thereinafter declared.

The settlement contained no covenants for title.

On April 18, 1883, the wife died intestate, leaving her husband tenant by the curtesy and her daughters, Agnes Ann Price and the defendant Alice Catherine Kirkhouse, co-heiresses of the unsettled moiety.

On June 7, 1893, Agnes Ann Price died intestate, and her share was subsequently conveyed by her heir to the defendants John and Pegge in fee simple as tenants in common.

By his will dated July 19, 1899, the husband devised the 70*l.* rent-charge to the plaintiffs as joint tenants.

The husband died on April 1, 1902.

The unsettled moiety was sufficient to pay the whole rent-charge, but the defendants contended that it was only subject to a moiety thereof. The plaintiffs, therefore, brought this action for a declaration that it was subject to the entirety, and for consequential relief.

It was admitted that the settled moiety was free of the rent-charge.

The defendant Alice Catherine Kirkhouse entered an appearance but put in no defence, and did not appear at the trial.

R. J. Parker, for the plaintiffs. Although the rent-charge is not mentioned in the settlement, the settled moiety was released by the husband's release of all claims and demands: Co. Litt. 292 a. Under the old law this release would have extinguished the whole rent-charge: 18 Vin. Abr. p. 504; but under the Law of Property Amendment Act, 1859, s. 10, the release only barred the right to recover any part of the rent-charge out of the settled moiety, without prejudice to the rights of persons interested in the unsettled moiety, and not concurring, to have a proportionate abatement: *Booth* v. *Smith*. (1) In this case

(1) 14 Q. B. D. 318, 321.

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the husband and wife, the owners of the unsettled moiety, concurred; so there was no abatement.

J. G. Wood, for the defendants John and Pegge. The plaintiffs' argument is sound, if the settlement is construed as a release of the rent-charge by the husband with the concurrence of himself and his wife. But that is not the true construction. The husband not only granted, released, disposed of, and confirmed the settled moiety, but also all his estate, right, title, interest, property, claim, and demand in, to, and out of the same to the trustees. That operated as a conveyance and passed, not only the estate vested in him as husband, the character in which he joined, but every estate and interest vested in him in his private right: *Drew* v. *Earl of Norbury* (1); *Johnson* v. *Webster* (2); Elphinstone on the Interpretation of Deeds, pp. 204, 206.

Primâ facie, therefore, the whole rent-charge passed to the trustees. At all events, the proportion issuing out of the settled moiety passed, and the plaintiffs are entitled at most to half the charge.

The plaintiffs rely on the word "release," and apply it to the rent-charge. But it is really a survival from the old conveyance by lease and release, or release simpliciter under the 4 & 5 Vict. c. 21. In the older conveyances all possible operative words were used together by way of precaution, so as to be sure of including the right one. It is not, therefore, necessary to try and find a meaning for each word.

In the present case the rent-charge is not mentioned, the husband probably thinking it was merged by his purchase, and the word "release," if it means anything at all, can be applied to the release of the husband's marital right in the settled moiety.

R. J. Parker, in reply.

Cur. adv. vult.

April 13. SWINFEN EADY J. The question is what was the legal effect of the voluntary settlement of 1868 upon the

(1) 9 Ir. Eq. Rep. 171, 177; 3 J. & Lat. 267, 284; 72 R. R. 62.
(2) 4 D. M. & G. 474, 488.

rent-charge of 70*l.* charged upon and issuing out of the hereditaments thereby conveyed, and other hereditaments. It is not disputed that the hereditaments thereby conveyed were released from all liability in respect of the charge.

It was contended on behalf of the first two defendants, either that the whole rent-charge of 70*l.* passed to the grantees of the voluntary settlement, or that a moiety of it passed to them, leaving only a moiety charged on the remaining hereditaments.

By the Law of Property Amendment Act, 1859, s. 10, it is provided as follows: "The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release."

Before this Act a person having a rent-charge, by releasing his right in part of the land charged, extinguished the whole rent: 18 Vin. Abr. p. 504. The effect of the settlement, which was executed since the Act, was to release from the rent-charge the part of the hereditaments comprised in the deed, but not to extinguish the whole rent-charge.

Upon a release of a portion of hereditaments charged with a rent-charge, if the persons entitled to the remaining hereditaments have not concurred in or confirmed the release, their rights are not affected under the statute; and accordingly it was held in *Booth* v. *Smith* (1) that the remaining hereditaments in such a case will be subject only to a proportionate part of the whole rent-charge. But in the present case, the persons entitled to the remaining hereditaments did concur in and confirm the release, and as regards the wife by deed duly acknowledged, so that they were not entitled to the benefit of that portion of the section beginning "without prejudice nevertheless." Their rights were governed, therefore, by the earlier words of the section—that the release shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released. The remaining hereditaments remain

(1) 14 Q. B. D. 318, 321.

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liable, therefore, to the whole of the rent-charge, without apportionment.

This in my opinion is the legal effect of the transaction, and probably was also the intention of the parties, so far as can be gathered from the settlement. The deed contains no reference to the rent-charge, or to the release of it or any part of it, and it may well be that the husband was willing to concur in the deed and release the hereditaments comprised in it, being satisfied that the remaining hereditaments were a sufficient security for the whole rent-charge, as indeed I understand they were and are.

After concurring in the settlement, and conveying all his estate and interest in the hereditaments conveyed, the husband could not have afterwards contended successfully that he retained any charge upon or interest in the land conveyed, and the two cases of *Drew* v. *Earl of Norbury* (1) and *Johnson* v. *Webster* (2), cited for the defendants, support this view; but they are not any authority for the proposition contended for on behalf of the defendants that all or some part of the rent-charge of 70*l.* actually passed by way of grant to the grantees under the voluntary settlement. The effect of that deed is to release the hereditaments conveyed from all and every part of the rent-charge, but not to grant all or any part of the rent-charge to the grantees. It remained vested in the grantor, and his right to enforce it against the remaining hereditaments charged by it was not affected by that deed. There must be a declaration accordingly, and the defendants must pay the costs of the action.

Solicitors: *Sharpe, Parker, Pritchards, Barham & Lawford, for Jeffreys & Powell, Brecon; J. Clement Brown, for C. Valentine Pegge, Neath.*

(1) 9 Ir. Eq. Rep. 171, 177; 3 J. & Lat. 267, 284; 72 R. R. 62.
(2) 4 D. M. & G. 474, 488.

G. R. A.

In re APPLETON, FRENCH & SCRAFTON, LIMITED. WARRINGTON J.

1905

May 3.

[0018 of 1898.]

Company—Winding-up—Private Examination—Costs of Persons examined—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

An examination under s. 115 of the Companies Act, 1862, is a "proceeding in the Supreme Court" within the meaning of the Judicature Act, 1890.

The Court has, therefore, jurisdiction under the Act of 1890 to order the costs—as distinguished from the expenses—of a person examined to be paid by the person who procured the examination; but, *semble*, not where the examinee is a mere witness, and not a person with whom litigation is pending or intended.

A., a creditor of a company in winding-up, and B., a contributory, and other contributories took out a summons for liberty to issue a misfeasance summons against the directors of the company, and for liberty to examine such persons as they might be advised under s. 115 of the Companies Act, 1862.

On this summons an order was made giving liberty to examine W. and X., and to apply for leave to issue a misfeasance summons after the examination was concluded.

A summons was then issued for the examination of W. and X., and at their examination they employed solicitors and counsel.

A misfeasance summons was then issued by A. and B. against W. and X., who were officers of the company, but was dismissed with costs, which were taxed and paid.

W. and X. then applied for an order that A. and B. should pay the applicants their costs incurred in connection with their examination and being represented thereat by counsel:—

Held, that there was jurisdiction under s. 5 of the Judicature Act, 1890, to make the order, and that, having regard to the object of the examination and the position of the applicants as intended litigants, the order must be made.

A COMPANY called Appleton, French & Scrafton, Limited, passed an extraordinary resolution for voluntary winding-up in January, 1898, and on February 9, 1898, the voluntary winding-up was ordered to be continued under the supervision of the Court, and Edwin Waterhouse was appointed liquidator.

On August 7, 1899, a summons was taken out by Robert & Henry Adams, Limited, as a creditor of the company, and J. T. Wilson and others as contributories, for (1.) the discharge

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of Waterhouse from his office of liquidator; (2.) that the applicants might be at liberty, without giving any indemnity to the liquidator, to issue in his name a summons under s. 10 of the Companies (Winding-up) Act, 1890, against the directors of the company for damages for alleged misfeasance; and (3.) for leave to examine such persons as they might be advised under s. 115 of the Companies Act, 1862.

On this summons an order was made on February 7, 1900, that the applicants should be at liberty to examine J. W. Watson and A. H. Appleton and others under s. 115, and that summonses should issue accordingly; and that the applicants should have liberty "to apply for leave to take proceedings under s. 10 of the Act of 1890 after such examination has concluded as they may be advised."

A summons was issued on October 29, 1900, requiring Watson and Appleton and others to attend for examination under s. 115.

The examination took place on November 15, 16, and 17, 1900, when Watson and Appleton were examined as to certain alleged acts of misfeasance by them, and instructed counsel who appeared at the examination.

On July 31, 1902, Robert & Henry Adams, Limited, and J. T. Wilson issued a misfeasance summons against Appleton as an officer of the company, and Watson as a director thereof, and other officers of the company, asking for a declaration that the respondents were liable to contribute to the assets of the company a sum of 14,934*l.* for losses on options incurred by the company, and a sum of 37,821*l.* for losses on forward sales of wheat alleged to have been incurred by the company in unauthorized speculations, and for an order for payment of those amounts to the liquidator.

On July 28, 1904, the summons was dismissed with costs.

The costs of the misfeasance summons, which did not include any costs of Watson and Appleton at their examination under s. 115, were taxed and paid.

Watson and Appleton took out a summons asking that Robert & Henry Adams, Limited, and Wilson might be ordered to pay to the applicants their costs incurred in connection with the

examination on November 15, 16, and 17, 1900, and being represented thereat by counsel; and this summons was adjourned into Court, and heard by Warrington J. on May 3, 1905.

Sargant, for the applicants. There is jurisdiction to order the respondents to pay the costs of the applicants, and the order ought to be made.

Sect. 115 of the Act of 1862 only in terms provides for the payment of "a reasonable sum" for the "expenses" of the person to be examined, and says nothing about costs. It may be assumed that prior to the Judicature Act, 1890, there was no jurisdiction to order payment of the examinee's costs.

Owing to the construction placed on the Judicature Acts and Rules of the Supreme Court, 1883, Order LXV., r. 1, in *In re Mills' Estate* (1), the Judicature Act, 1890, was passed, s. 5 of which provides that, subject to the Judicature Acts and Rules "and to the express provisions of any statute," "the costs of and incident to all proceedings in the Supreme Court" shall be in the discretion of the Court, which shall have power "to determine by whom" "such costs are to be paid." A private examination is a proceeding in the Supreme Court, and the examinee's costs of it may be ordered to be paid by the persons who procured his examination.

A person examined under s. 115 is entitled to the assistance, at his examination, of counsel and solicitors: *In re Breech-loading Armoury Co.* (2)

Under the Bankruptcy Act, 1869, it was held that a person examined privately with a view of obtaining information only was entitled only to his expenses, and not to the costs of his solicitor or the fees paid to his counsel: *Ex parte Waddell.* (3) But the Court refrained in that case from saying whether the costs and fees could have been ordered to be paid if the examination had been obtained with a view to taking proceedings against the examinee. That is the case now before the Court, for the examination of the present applicants was obtained with a view to taking misfeasance proceedings against them.

(1) (1886) 34 Ch. D. 24. (2) (1867) L. R. 4 Eq. 453.
(3) (1877) 6 Ch. D. 328.

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Martelli, for the respondents. Sect. 115 points out what the examinee is entitled to be paid, namely, "a reasonable sum for his expenses."

In Buckley on Companies, 8th ed. p. 348, the effect of *Ex parte Waddell* (1) is thus stated: "It is conceived that if he"—the examinee—"be a mere witness, and not a person between whom and the party summoning him any litigation is pending, he will not be entitled to the costs of employing a solicitor or counsel." When the application was made for examination no proceedings were pending between the examinees and the present respondents.

The examinees were not litigants, but mere witnesses.

It is contended, therefore, (*a*) that there is no jurisdiction to order the respondents to pay these costs; and (*b*) that, if there is jurisdiction, this is not a case in which it ought to be exercised.

Sect. 5 of the Judicature Act, 1890, does not give jurisdiction, for an examination under s. 115 of the Act of 1862 is not a proceeding in the Supreme Court: see *In re Greys Brewery Co.* (2)

If the applicants are entitled to the costs claimed, every witness who is called before the Court is entitled to be paid his costs, as distinguished from his expenses.

It is submitted that these costs are not costs of litigation. If, on the other hand, they are costs of litigation, they ought to have been included in the applicants' costs of the misfeasance summons, which have been taxed and have been paid by the respondents.

When the Legislature intends that the examinee shall be entitled to costs, as distinguished from expenses, it takes care to so expressly provide, as in s. 8, sub-s. 7, of the Companies (Winding-up) Act, 1890.

No reply was called for.

WARRINGTON J. This is an application by two officers of the company, against whom a misfeasance summons was taken out, asking that they may be allowed, in addition to the costs of that summons, which have been taxed and paid, the costs

(1) 6 Ch. D. 328. (2) (1883) 25 Ch. D. 400.

incurred by them in connection with their examination under s. 115 of the Companies Act, 1862.

One question which arises for my decision is whether the Court has jurisdiction to order these costs to be paid; the other is whether, assuming there is jurisdiction, the Court ought, in the particular circumstances of this case, to allow the costs.

As regards the jurisdiction, s. 5 of the Supreme Court of Judicature Act, 1890, enacts as follows: "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid." It seems to me that, as regards the jurisdiction, the only question to be considered is whether an examination under s. 115 of the Act of 1862 is a proceeding in the Supreme Court. If it is, the Court has jurisdiction, and may say who is to pay the costs of and incident to that proceeding.

Sect. 115 of the Act of 1862 provides that in a winding-up the Court may "summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company," and that "if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed," the Court may cause him to be "apprehended and brought before the Court for examination."

The section makes no provision as to the costs of the person examined, and therefore there is in it no "express provision of any statute" to prevent the application of s. 5 of the Judicature Act, 1890.

On August 7, 1899, the respondents to the present application and others issued a summons for (1.) the discharge of Mr.

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Waterhouse from his office of liquidator; (2.) that the applicants might be at liberty, without giving any indemnity, to issue against the directors a summons under s. 10 of the Companies (Winding-up) Act, 1890; and (3.) for leave to examine such persons as they might be advised under s. 115 of the Act of 1862.

On that summons, on February 7, 1900, an order was made that the present respondents should be at liberty to examine the present applicants and others under s. 115 of the Companies Act, 1862, and that summonses should issue accordingly, and giving the applicants liberty to apply for leave to take proceedings under s. 10 of the Companies (Winding-up) Act, 1890, after the examination had been concluded as they might be advised. The examination took place on November 15, 16, and 17, 1900, the present applicants having at their examination the assistance and protection of solicitor and counsel.

On July 31, 1902, the two respondents to the present application issued a misfeasance summons against the present applicants. The claim made against the present applicants was for a sum of over 50,000*l.*, and was therefore a matter of great importance. The summons came on for hearing in July, 1904; but no one appeared to support it, and it was dismissed with costs.

I have to decide whether, the present respondents having put the applicants to great expense by examining them in order to support the misfeasance summons, the applicants' costs ought to be paid by the respondents.

Now as regards the jurisdiction to order the costs to be paid, in my judgment the summons of August, 1899, the order for examination made under it, the summons issued in pursuance of that order, and the examination which took place are all "proceedings in the Supreme Court." If they are not, I do not know what they are. It is contended that in saying that I am saying something which is contrary to the decision of Chitty J. in *In re Greys Brewery Co.* (1) I am doing nothing of the kind. The decision in that case was on the question whether creditors of the company who under rule 60 of the

(1) 25 Ch. D. 400.

General Order of November, 1862, had liberty to attend proceedings before the judge were entitled to be present at an examination under s. 115; and it was held by Chitty J. that the examination was not a proceeding within rule 60. As stated at the end of p. 405 in the report in the *Law Reports*, the learned judge said: "It appears to me that I should be misreading the general language of the 60th rule if I said that it gave a right to every creditor to attend in this very particular and exceptional proceeding. . . . . I think, although there is a technical argument upon the 60th rule, that, upon the true reading of it, this is not such a proceeding as is mentioned there; and a distinction arises to my mind from the very nature of the proceeding under the 115th section." One must read in connection with that passage what the learned judge had previously said (1), namely, that "the examiner's office is not a public office, and that the public have no right to attend." The meaning of the judgment is that looking at the nature and object of an examination under s. 115, that examination may be a proceeding, although it is not a proceeding "before the judge" within the meaning of the 60th rule. It is not necessary for me to say whether it is a proceeding within that rule, but I think that it is a "proceeding in the Supreme Court" within the meaning of s. 5 of the Judicature Act, 1890.

Having jurisdiction to make the order asked for, ought I, in the exercise of my discretion, to determine that the costs ought to be paid by the respondents?

I desire to say in the strongest terms that my exercise of discretion in this case is not to be used as a precedent in any other case. Mr. Martelli has frightened me by arguing that if I make the order asked for witnesses can always come forward and ask for orders for payment of their costs. I intend to lay down no such general rule, and I only make the order now under the particular circumstances of this case. The first summons asked for leave to examine witnesses and leave to issue a misfeasance summons, and the examination was asked for for the express purpose of establishing a case in support of the misfeasance summons. I agree that ordinarily

(1) 25 Ch. D. 404.

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persons examined under s. 115 of the Act of 1862, as in bankruptcy, merely as witnesses would not be entitled to be paid out of the assets or otherwise their costs of employing solicitors or counsel.

The case relating to an examination in bankruptcy is *Ex parte Waddell* (1), and nothing that I say is intended as a departure from what was laid down by the Court of Appeal in that case. Both James and Cotton L.JJ. there grounded themselves for deciding as they did on the fact that the person examined was a mere witness. James L.J. said (2): "This is not the case of a man who is charged with having property in his possession belonging to a bankrupt and is summoned to give evidence respecting it. In such a case it might possibly be said that there was a litigation between him and the trustee, and that he was entitled to be protected by counsel." And Cotton L.J. said: "Really the only question is, to what a witness, not being a person against whom any allegation is made with regard to the bankrupt's property, or against whom any proceeding is intended to be taken, but who is examined as a mere witness because it is supposed he can give evidence with regard to property which was at some time or other in the possession of the bankrupt, is entitled as his reasonable expenses."

I have here the very case to which the Lords Justices referred, namely, that of an examination of persons against whom allegations were made with respect to the company's property and against whom proceedings were intended to be taken. I should be wrong if I did not make the respondents pay the costs which they put the applicants to by examining them with a view to taking misfeasance proceedings against them, and I therefore make the order asked for.

[Leave to appeal was given.]

Solicitors for applicants: *Crump, Sprott & Co., for Archer & Co., Stockton-on-Tees.*

Solicitors for respondents: *Jacksons & Elwell, for James Inskip & Co., Bristol.*

(1) 16 Ch. D. 328. (2) 6 Ch. D. 331.

F. E.

ATTORNEY-GENERAL *v.* METROPOLITAN ELECTRIC SUPPLY COMPANY, LIMITED.

C. A. 1905 March 22.

[1904 A. 391.]

Metropolis—Electric Lighting—Company incorporated under Companies Acts — General Powers — Special Statutory Powers—Statutory Prohibition against supplying Electricity beyond Statutory Areas—Statutory Power to erect Generating Station outside Statutory Areas—Supplying Electricity outside Statutory Areas—Metropolitan Electric Lighting Act, 1889 (52 & 53 *Vict. c. cxcvi.*), *s.* 5—*Metropolitan Electric Supply Company Act*, 1898 (61 & 62 *Vict. c. ccxxxv.*), *ss.* 2, 16.

In 1889 a limited company, formed under the Companies Acts for the purpose of generating and supplying electric energy, obtained a special Act and certain provisional orders of the Board of Trade empowering them to supply electric energy in three specified areas within the administrative county of London. The special Act and the orders contained clauses in identical terms prohibiting the undertakers from supplying energy or erecting electric works beyond their statutory areas, except by the authority of Parliament or under a licence from the Board of Trade. In 1898 the company, being unable to supply the demands of their customers in their statutory areas from their generating stations in those areas, obtained another special Act authorizing them to erect generating works in an urban district outside the county of London. In 1903 the company, purporting to act under the general powers in their memorandum of association, commenced to supply energy from their works in the urban district to a railway company in that district. In an action by the Attorney-General, at the relation of the local authority of the urban district, to restrain the company from so doing:—

Held, that the prohibition in the Act of 1889 was not limited to the administrative county of London, but was general, and that the company were acting in contravention thereof.

Decision of Farwell J., ante, p. 24, affirmed.

APPEAL of the defendants from a decision of Farwell J. (1) The facts are fully stated in the previous report of the case.

Cripps, K.C., and *Jenkins, K.C.* (*Sargant* with them), for the appellants. The appellants are a company incorporated under the Companies Act, 1862, and by their memorandum of association they have ample powers to supply electricity anywhere so long as they can do so without asking for statutory powers;

(1) Ante, p. 24.

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but they have also certain London undertakings which are the subject of certain special Acts containing restrictions as to supplying electric energy elsewhere. The question is whether s. 5 of the Metropolitan Electric Lighting Act, 1889 (1), and the provisional orders, which relate to the appellants' London undertakings, prohibit them from supplying the railway company from their Willesden station, and, if so, whether the Metropolitan Electric Supply Company Act, 1898, removes the prohibition. The Act of 1889 was founded upon a report made to the Board of Trade by Major Marindin, and that report recommended that London should be divided into districts, and that not more than two companies should be allowed to supply electricity in any one district; and, when once that principle was adopted, it became necessary to prevent any company from raiding any other district. That was the meaning of the prohibition in s. 5 of the Act of 1889. That section was intended to prevent any abuse of the powers conferred by the Act, and was not intended to operate outside the administrative county of London. The object of the section was only to impose a restriction upon the undertakers quâ undertakers, and not to limit their rights when acting in their private capacity. The section prohibits the appellants from supplying by agreement other districts in the metropolis in contravention of the districting principle, but it does not prevent them from supplying by agreement other districts outside the metropolis. The Act is dealing with metropolitan areas alone. If this is the correct view of the Act of 1889, the Act of 1898 was required, not to enable the defendants to erect and use a generating station in Willesden—that they could do without any statutory powers—but to enable them to connect their cables with the metropolitan areas which they were supplying

(1) Sect. 5 provides as follows: "The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament, or under a license granted by the Board of Trade under the principal Act:

"Provided that where the undertakers were on the 20th of May, 1889, supplying or under any binding agreement to supply energy to any premises beyond the area of supply they may continue to supply or supply energy to such premises until the 29th of September, 1890. . . . ."

under their statutory powers. That explains why the preamble refers only to the necessity of generating electricity for the supply of the metropolitan areas. Assuming that we are wrong as to the construction of s. 5 of the Act of 1889, we say that the Act of 1898 is an authority to the appellants to supply outside their districts within the meaning of that section.

Upjohn, K.C., and *J. W. Greig*, for the plaintiffs.

LORD ALVERSTONE C.J. This case has been very ably argued on behalf of the appellants, and every possible view which might be of assistance to us has been put before us. I am unable to see, speaking for myself, any flaw in the reasoning of Farwell J.'s judgment, and I shall add but little to it. I propose to state generally my reasons why I concur in that line of reasoning. These Electric Supply Acts for the metropolis cannot be considered quite independently of the general legislation with regard to the matter. It is quite true that all the considerations which would apply, if we were dealing with an order made under the Electric Lighting Act, 1882, do not arise in this case, and the appellants' main argument is that, as regards the matters complained of in this action, they are acting, not in exercise of any statutory or Board of Trade power at all, but as a limited company under the Act of 1862, in accordance with the general powers of their memorandum of association, and that there is no prohibition in the Act of 1889 or in the provisional orders of 1889, when properly construed, to prevent them from doing what they have done. I am unable to take that view. I am unable to put any other construction upon s. 5 of the Act of 1889 than that which Farwell J. put upon it. I agree that the main object of these orders under the legislation of 1889 was for the districting of the metropolis. I think that the main motive which induced the Legislature to provide that there should be only two companies in any one district, and to make certain provisions with regard to the non-acquisition by any company of works in any other district within the administrative county of London except by the authority of an Act of Parliament, was to carry out the scheme recommended in Major Marindin's report—a

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scheme which was recognised as being the best scheme for the metropolis. I am unable, however, to follow the argument that for the purpose of this legislation one ought to disregard entirely what I may call the outlying areas. The outlying areas would be contiguous to a very large extent to the districts the subject of this legislation. I therefore think that, unless there is something which clearly indicates to us that we are not to apply the plain language of the Act of Parliament to what is being done in an outlying area, we must take the words in their natural sense.

The prohibition is contained in s. 5 of the Act of 1889, and it is in the same terms as the orders relating to the other areas within the metropolis which the company were authorized to supply. I rather infer that there are other orders with regard to other districts of London which contain a similar clause, and I am told it is common form: "The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament." It seems to me that primâ facie that means this. Given this statutory district, given the rights which the Act is going to grant you, you and some other company, in regard to this statutory district, one of the terms of that bargain is that you are not to supply electricity beyond that area except under the authority of Parliament. It is said that the word "undertakers" ought to be limited as meaning the people who are exercising the powers within the statutory district. I think that that would be a very strained construction to apply to this particular Act and these particular orders, because s. 3 states that the "undertakers" for the purpose of this Act are the Metropolitan Electric Supply Company, Limited; and bearing in mind that they had no statutory powers before, and that they were getting statutory powers under this Act, in my opinion the "undertakers" spoken of in s. 5 are not intended to be a body in future to be created or a body which is carrying on this particular undertaking, but the people who are named and who have come to Parliament and asked for these privileges.

Then I am unable to answer my learned brother Farwell's argument that the proviso at the end of s. 5 is really unnecessary as it is stated here, if the section is only to apply to the districts in the administrative county of London. It is perfectly true, as has been urged upon us, that it might very likely be wanted to some extent to prevent overlapping or raiding of other districts; but at the same time it seems to me that if it was intended to leave the undertakers free to supply by agreement in outlying areas we should not have found the words given here—"where the undertakers"—who were a non-statutory company—"were on the 20th of May supplying, or under any binding agreement to supply, energy to any premises beyond the area of supply."

I can well understand that the Legislature when providing a series of self-contained districts with their own generating stations and systems thought it desirable that the privileged companies should not set up a non-statutory trade by agreement outside the area or district which they were authorized to supply. There seems to me more than one reason why it may have been thought prudent to limit the powers of the companies in that respect. I am unable to construe the words "shall not supply energy beyond the area of supply otherwise than under the authority of Parliament" as not including a prohibition against the supply outside the areas by these undertakers. To a certain extent that view is confirmed by the words "or except for the purposes of this Act" (contained in the bracket) "erect or lay down." I cannot help thinking that that shewed that for the mere purpose of supplying the district they might go outside and could lay down electric lines or wires, but that they could not supply the energy outside. Whether I am right or wrong in this view, for the reasons which Farwell J. has given, and which I have ventured briefly to indorse, I come to the conclusion that the bargain of which the company took the benefit in the year 1889 was for limited rights within the London districts, with the condition that they should not supply outside.

That being so, I have only now to consider the Act of 1898. We have been pressed to hold that s. 2 is a section that enables

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the company to establish generating works at Willesden for the general purposes of their business, and to supply from the generating station by agreement outside the area. I will not refer to the preamble beyond saying this—that I think the preamble affords a strong argument to shew that the case for enlarging their works from the necessities of their general business was not made before Parliament. I have a strong view that the preamble, which is passed first, shews that the motive of this bill was the necessity of generating electricity in order to supply the district areas, and I cannot read this s. 2 as negativing by implication the express prohibition which, in my opinion, exists by virtue of the 5th section of the Act of 1889 and of the orders. The Willesden Urban District Council obtained at the same time certain powers under the Act of 1882. The appellants admit that they did not get any statutory powers to supply Willesden. When we remember that the Willesden Council were opposing that bill and obtained the insertion of a clause (s. 15) for their protection as to breaking up streets and so on, I think that they were entitled to rely upon the prohibition of supply contained in the Act of 1889. That being so, s. 16 is necessary to enable the company to use their cables for the transmission of electric energy from their works at Willesden to the several distributing stations in the several areas over which they had powers of supply. I cannot treat that as an unnecessary section. I cannot think that the language of s. 2 is so large that no express power was necessary. It seems to me that if it was intended that the prohibition should be got rid of, and that this company should be free to supply by agreement electricity in the Willesden area, they being a company with limited statutory powers, different language would have been used. I may not be taking the correct view, but I have throughout the argument felt that the Legislature in providing this scheme for the several areas in the metropolis must have taken into consideration the rights of the local authorities in the surrounding outlying areas under the general Act of 1882. To my mind, it is not inconsistent with those rights that the Legislature may have intended to limit the right of the privileged company to supply by agreement outlying

areas, and finding these express words I am forced to apply the natural meaning to them, and am unable to put upon them the limited meaning which has been pressed upon me. I do not refer in terms to s. 3 of the Act of 1889 beyond saying that in my opinion it is a section which does not deal with the right of supply at all. It merely dealt with the position of persons who became assignees of the undertakers, that is to say, the Metropolitan Electric Supply Company, and limited the right of the Metropolitan Electric Supply Company to purchase or acquire the undertaking of any other company, or to associate themselves with any other company supplying electricity within the administrative county of London. I think that that section does not assist in the construction of s. 5. For these reasons, which I have endeavoured to express somewhat briefly, I agree with Farwell J., and I think that this appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I agree. After the full manner in which my Lord has dealt with this case which we have to determine I only propose to say a word or two, and I do not know that I should say anything if it were not that it seems to me that this is a very important case, and may affect not only this company, but very likely other electric light companies. I say for myself that it seems to me a very difficult Act of Parliament to construe, and I have been a good deal impressed by the arguments that have been addressed to us upon the lines that the Act of 1889 and the Board of Trade orders are only intended to deal with places within the limits of the metropolis. But, notwithstanding the feeling that there is a good deal in that contention, I am not prepared to depart from the plain meaning of the words of the 5th section of the Act of 1889. The words of that section are: "The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament, or under a license granted by the Board of Trade." In effect the appellants invite us to introduce into s. 5 after the words "the undertakers shall not" the words "within the administrative

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county of London." I am not prepared to do that. I give full consideration to the doubt I had in my mind as to whether the Act of 1889 and the provisional orders confirmed by the Act of Parliament are not limited to the metropolis, but I think that when one looks at s. 5 itself and at the proviso that language goes a long way to exclude the contention that we ought to read that section as if it had no application except within the administrative county of London.

With respect to the Act of 1898—the Act which is relied upon by the Metropolitan Electric Supply Company as giving an authority to do that which they have now been restrained from doing—I do not purpose to repeat the observations either of my Lord or of Farwell J. I agree for the reasons that they have given that that contention cannot be supported. But according to my view the Act of 1898 not only does not support the contention of the Metropolitan Electric Supply Company, but the preamble of the Act and the provisions of the 16th section of that Act both shew that the Legislature, when they passed the Act of 1898, passed that Act upon the basis and assumption that the Act of 1889 was not to be limited either in effect or in construction to the metropolis. Under these circumstances I think that the view which Farwell J. has set forth ought to be adopted.

STIRLING L.J. I am of the same opinion, and I cannot add anything usefully to what has been said by my Lord, by Vaughan Williams L.J., and by Farwell J.

Solicitors: *Barlow & Barlow; W. G. Greig.*

H. B. H.

END OF VOL. I.

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—— *Thurso New Gas Co., In re*, (1889) 42 Ch. D. 486.
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—— *Tilling, Ld.* v. *Blythe* [1899] 1 Q. B. 557
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—— *Turner* v. *Moon* - - [1901] 2 Ch. 825
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—— *Wilde* v. *Gibson*, (1848) 1 H. L. C. 605, 632; 73 R. R. 191, 209.
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—— *Wright* (*Sir Benjamin*), *Ex parte*, (1683) 1 Vern. 155.
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—— Shares — Negotiable instrument — Title. Primâ facie evidence of - - 646
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CHARITY— *Commissioners — Jurisdiction — Exemption — Cathedral Church — Endowment for Minor Canons — Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 62.
An endowment for the minor canons of a

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cathedral church, which is not part of the capitular estates, or under the control of or held in trust by the dean and chapter, is not an endowment of the cathedral church, so as to be exempt from the jurisdiction of the Charity Commissioners by virtue of s. 62 of the Charitable Trusts Act, 1853, even though the income indirectly relieves the capitular revenue pro tanto from payment of the minor canons' minimum statutory stipends.

In re Meyrick's Charity, (1855) 25 L. T. (O.S.) 92; 1 Jur. (N.S.) 438, distinguished. *In re* Dod's Charity - - **Swinfen Eady J. 442**

2. —— *Mortmain—Gift for Maintenance of Churchyard—Statute—Implied Repeal—Gifts for Churches Act*, 1803 (43 *Geo.* 3, *c.* 108), *s.* 1—*Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *s.* 7.

The restriction contained in the Gifts for Churches Act, 1803, s. 1, is impliedly repealed by s. 7 of the Mortmain and Charitable Uses Act, 1891:—

Held, therefore, that a residuary gift by a testatrix of property exceeding 500*l.* in value for the maintenance of a churchyard was a valid charitable gift. *In re* Douglas. Douglas *v.* Simpson - - - - **Kekewich J. 279**

3. —— *Repair of Burial Grounds—Restriction to Members of a particular Sect—Advancement of Religion—Will—Legacy.*

A bequest for the purpose of keeping in good order burial grounds the use of which is restricted to members of the Society of Friends is a gift for the advancement of religion and, therefore, a valid charitable legacy. *In re* Manser. Attorney-General *v.* Lucas - - **Warrington J. 68**

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CLASS—Donee of power herself a member of the class—Power of donee to appoint to herself - - - - **529**
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COMPANY—*Bonds bearing Interest out of Profits—Deficiency in Interest—Sale of Bonds—Tenant for Life and Remainderman.*

Second mortgage 6 per cent. gold bonds of a Mexican railway company contained a promise by the company to pay the principal secured in 1917, and interest thereon, "accumulative, at the rate of 6 per cent. per annum" on March 1 and September 1 in each year, "upon surrender of the

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annexed coupons, as and when earned, out of any net earnings of any year remaining after interest" on the company's first mortgage bonds had been paid for such year, and provided as follows: "If in any year the net earnings so remaining available for payment of interest upon the" second mortgage bonds "shall not be sufficient to pay such interest in full, there shall be paid any part thereof earned and available, and any deficiency shall not be waived, but shall be paid to the holder hereof out of the net earnings of any subsequent year or years, as and when there shall be any net earnings available for such purpose."

By a settlement made in May, 1899, some of the second mortgage bonds were settled upon trust to pay the income to M. for life, and after her death to her husband, T., for life, and after the death of the survivor, if T. survived her, in trust for the next of kin (excluding T.) of M.

Interest less than 6 per cent. per annum was paid on the bonds down to 1901, and no deficiency of any year was ever made up out of the earnings of any subsequent year or otherwise.

In March, 1902, the bonds, with the coupons, were sold by the trustees for 2700*l.*, and in May, 1902, M. died leaving T. surviving her, and he was her legal personal representative:—

Held, that T. was not entitled to any part of the 2700*l.* as representing the apportioned amount in respect of any deficiency of interest in M.'s lifetime, but that the whole of the 2700*l.* went to M.'s next of kin. *In re* Taylor's Trusts. Matheson *v.* Taylor - - **Buckley J. 734**

2. —— *Debenture — Floating Security — No Money payable on Debenture—Jeopardy—Receiver.*

Debenture-holders, who have a floating security upon the undertaking and all the property, present and future, of a company, are entitled to the appointment of a receiver of the property subject to the debentures if their security is in jeopardy, although nothing is payable in respect of principal or interest, and there has been no default or breach of contract by the company. *In re* London Pressed Hinge Company. Campbell *v.* London Pressed Hinge Company - - - **Buckley J. 576**

3. —— *Debentures—Transfer or New Issue—Debentures paid off and handed back to Company with Blank Transfers—Subsequent Transfer of Debentures by Company filling in Blanks.*

A company issued debentures which were to be a first charge on the property of the company, who were not to be at liberty to create any mortgage or charge in priority to or pari passu with these debentures. Some of the debentures were issued as security for a loan; the loan was paid off by the company, and the debentures handed back to the company with transfers having blanks for the names of the transferees. Subsequently the company, for value received, handed over the debentures together with the transfers, with the blanks filled in by the company, to persons who had applied for debentures:—

Held, that this transaction was not a transfer of original debentures, but a creation of new debentures, and that the holders of the new debentures were not entitled to rank pari passu

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with the original debenture-holders. *In re* W. TASKER & SONS, LIMITED. HOARE *v.* W. TASKER & SONS, LIMITED - - Kekewich J. 283

4. —— *Meetings—Special Resolution—Notice of both Meetings in one Document—Special Clause in Articles of Association—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

The articles of association of a company limited by shares provided (in clause 70) that seven days' notice at the least of a general meeting should be given to the members, and continued as follows: "Whenever it is intended to pass a special resolution, the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting."

The directors gave notice in writing that an extraordinary general meeting of the company would be held on February 15, 1905, at a certain hour and place, when a resolution subjoined (which was for reduction of capital) would be proposed. The notice proceeded as follows: "Should such resolution be duly passed by the required majority, the same will be submitted for confirmation as a special resolution to a subsequent general meeting of the company which will be held on Friday, the 3rd day of March, 1905, at the same time and place":—

Held, that the articles of association could not override *s.* 51 of the Companies Act, 1862; that the concluding paragraph of the document, being only notice of a contingent meeting, was not notice of a meeting within the meaning of the section; and that the resolution had therefore not been duly confirmed. *In re* NORTH OF ENGLAND STEAMSHIP COMPANY Buckley J. 609

5. —— *Prospectus — Irregular allotment — Return of Application Money — Cancellation of Allotment—Rescission—Ultra Vires — Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 4, 5, 12.

The defendant company was registered in 1897, but no public issue of its shares was then made. On May 12, 1904, an agreement was entered into between the plaintiffs and the defendants that the plaintiffs should bear the expense of issuing and advertising a prospectus, which had been prepared by the defendants, in return for certain payments. The prospectus was duly issued. It stated that the minimum number of shares upon which allotment would be made was 40,000. As soon as the subscriptions amounted to 40,003 the directors proceeded to allot shares to the applicants, including the plaintiffs, and received the application money. It turned out that some of the applications were not effective, and that the minimum subscription had not been reached. The directors of the defendant company proposed to give to each allottee the option to have the allotment cancelled and the application money returned. The plaintiffs moved for an injunction to restrain them from doing so:—

Held, that the agreement gave the plaintiffs no right to the injunction; that the allotment was irregular under *s.* 4 of the Companies Act, 1900, and was voidable; that under that section the allottees had a right at any time to rescind their contract to take shares; that the allottees could also rescind on the double ground that there was an untrue statement in the prospectus, and that the condition with respect to the minimum number of shares had been broken; and that the proposed action of the directors was not ultra vires. FINANCE AND ISSUE, LIMITED *v.* CANADIAN PRODUCE CORPORATION, LIMITED Buckley J. 37

6. —— *Reconstruction under Power in Memorandum of Association—Sale of Assets for "Shares" in New Company—Partly paid Shares—Distribution of Consideration — Evidence — Unstamped Agreement—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

A company authorized by its memorandum of association to sell its undertaking for "shares" may, if there is nothing in the context or in the memorandum or articles of association as a whole so to qualify the meaning of the word "shares" as there used as to confine it to fully paid shares, accept partly paid shares as consideration. MASON *v.* MOTOR TRACTION COMPANY - Buckley J. 419

7. —— *Shares—Bankruptcy of Shareholder—Proof in Bankruptcy for Liability in respect of future Calls—Effect as to paying Shares up—Winding-up—Surplus Assets.*

Where the holder of shares in a company not fully paid is adjudicated a bankrupt, and the company proves in the bankruptcy for the estimated value of the liability to future calls on the shares and receives a dividend less than 20*s.* in the pound on the amount of the proof, the shares do not thereby become fully paid shares.

If the company is subsequently wound up, and after satisfying all its liabilities there remain assets for distribution among its shareholders, the bankrupt's estate is not entitled to benefit by the distribution as owning fully paid shares until it has paid to the liquidator the total amount remaining unpaid on the shares after receipt of the dividend from the bankrupt's estate.

The principle of *Grissell's Case*, (1866) L. R. 1 Ch. 528, applied. *In re* WEST COAST GOLD FIELDS, LIMITED. ROWE'S TRUSTEE'S CLAIM Buckley J. 597

8. —— *Shares—Certificate of Shares—Negotiable Instrument—Title, Primâ facie Evidence of —Stock Exchange—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 31 — *Transfer — Certification—Return of Certificate to Transferor—Mistake by Company's Secretary — Fraud of Transferor — Second Transferee—Loss, Proximate Cause of—Safe Custody of Documents of Title—Duty to the Public—Negligence—Liability of Company—Duty of Company towards Third Parties—Alteration of Position induced by Conduct—Estoppel—Secretary —Receipt—Authority to bind Company.*

If a company, having a certificate of shares in its possession, certificates a transfer of those shares to a proposing transferee, no duty is thrown on the company, with regard to the custody of the certificate, towards any person other than the proposing transferee, or any person claiming through him.

A share certificate is, under *s.* 31 of the Com-

COMPANY—*continued.*

panies Act, 1862, primâ facie evidence only of the title of the registered holder of the shares specified therein: it is not a negotiable instrument, nor is it a warranty of title on the part of the company issuing it. If the company, having had a certificate lodged with it together with the transfer for certification, subsequently returns the certificate to the transferor in error (for instance, by a mistake on the part of the secretary), and so enables the transferor fraudulently to deal afresh with the shares comprised therein and to obtain an advance thereon from a person ignorant of the circumstances under which the certificate had come to the hands of the transferor, that person cannot maintain against the company an action to recover the loss sustained by the fraud of the transferor on the ground that the company was bound to have retained the certificate when lodged; for the company owes no duty of safe custody to the public at large.

To entitle a plaintiff to recover from a defendant, on the ground of estoppel, a loss occasioned through culpable neglect on the part of the defendant, the plaintiff must prove that the negligence complained of occurred in the particular transaction in which his loss arose, and also that such negligence was the proximate, direct, or real cause of the loss.

The secretary of a company does not, when giving a transferee of shares the usual receipt for the transfer upon its being lodged for registration, thereby bind the company either to recognise the transferee's title to the shares or to issue the corresponding share certificate.

Decision of Farwell J. affirmed. LONGMAN *v.* BATH ELECTRIC TRAMWAYS, LIMITED C. A. 646

9. —— *Shares, Transfer of — Registering Transfer without Production of Share Certificate —Note on Certificate—False Declaration—Reasonable Inquiry — Liability of Company — Articles —Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 22, 30.

The articles of a limited company provided that the company should not be bound to regard or see to the execution of any trusts, whether express, implied, or constructive, to which any share might be subject; and that before registration of any transfer of shares, the instrument of transfer should be left at the office of the company, together with any evidence the company might require to prove the title of the transferor. C. was the registered holder of shares in the company, and in May, 1903, he deposited the certificate of his shares, and an executed transfer of the shares with the date in blank, with R. as security for a loan. Upon the certificate was this note: "Without the production of this certificate no transfer of the shares mentioned therein can be registered." In June, 1903, C., unknown to R., sold the shares to Y., and lodged with the company for registration a transfer to Y. of the shares, without the certificate, but with a written declaration by C. stating that the certificate was in the possession of a friend, but not as security for a loan or other consideration. C. was a servant of the company, and the directors, acting in good faith, accepted his declaration as sufficient and registered the shares in Y.'s name, and

COMPANY—*continued.*

issued to him a fresh certificate for the shares. In September, 1903, R. filled in the date of his transfer and lodged it with the company for registration, together with the original certificate; but the company declined to register his transfer because the shares had been already transferred to and registered in the name of Y. In an action by R. against the company for damages for having wrongfully registered the shares in Y.'s name:—

Held, that, if the company owed a duty to R. to take reasonable and proper care, they did not discharge it in accepting C.'s declaration as a sufficient explanation for the absence of the certificate:

But, *held*, that the company were not liable, for that the note on the certificate did not amount to a representation to or contract with the holder of the certificate that the shares would not be transferred without production of the certificate, but was only a warning to the owner of the shares to take care of the certificate because he could not compel the company to register a transfer without its production. RAINFORD *v.* JAMES KEITH & BLACKMAN COMPANY, LIMITED

Farwell J. 296

10. —— *Voluntary Liquidation—Agreement of Service—Resolution to wind up—Dismissal of Servant—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 131.

A resolution for the voluntary winding-up of a limited company does not operate as a notice of discharge to the servants of the company.

Shirreff's Case, (1872) L. R. 14 Eq. 417, examined and distinguished on this point. MIDLAND COUNTIES DISTRICT BANK, LIMITED *v.* ATTWOOD - - - Warrington J. 357

11. —— *Voluntary Winding-up—Dissolution —Stay of Proceedings — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 89, 138, 142, 143.

Though there is no jurisdiction to make an order directly extending the period of three months prescribed by s. 143 of the Companies Act, 1862, for the dissolution of a company in voluntary liquidation, the Court has jurisdiction, after the registration of the return, but before the expiration of the three months limited by this section, to make an order under ss. 89 and 138 in the matter of the voluntary winding-up to stay all proceedings in relation to such winding-up, and so keep the company on foot notwithstanding the expiration of the three months limited by s. 143.

In re Crookhaven Mining Co., (1866) L. R. 3 Eq. 69, discussed and applied. *In re* EASTERN INVESTMENT COMPANY, LIMITED

Warrington J. 352

12. —— *Winding-up — Creditor—Proof for Interest—Solvent Company—Gaming and Wagering Contract — Interest on Sums deposited as Cover.*

A company carrying on the business of outside brokers had transactions with its customers which were held to be illegal gambling transactions. The customers deposited money with the company as cover for differences on these transactions, and it was held that they were entitled to prove in the winding-up of the company for

the amounts remaining in the company's hands as deposits.

The liquidator, on the proofs admitted in respect of deposits, paid by cheques two dividends amounting together to 20*s.* in the pound, and each creditor gave him a receipt for the amount of the second dividend, describing it as "the amount payable to me in respect of the second and final dividend of 10*s.* in the pound on and in full discharge of my claim against this company."

After payment to the creditors of 20*s.* in the pound on the principal of their deposits there remained a surplus in the hands of the liquidator.

It was shewn that by the course of dealing between the company and its customers interest at 4 per cent. was paid on the deposits:—

Held, that there was an implied contract by the company to pay interest on the deposits, and that the creditors were entitled to receive out of the surplus interest from the date of the winding-up until the date of payment of the second dividend:

Held, also, that there had been no accord and satisfaction of the claim for interest. *In re* W. W. DUNCAN & Co. - - **Buckley J. 307**

13. —— *Winding-up—Life Assurance Company—Separate Account of Premiums where other Business carried on—Reduction of Contracts—Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *ss.* 4, 22.

A company carrying on business as tea-dealers offered to customers who purchased tea from it consecutively for certain periods pensions payable during widowhood. In order to form the premium income to support the pension contracts the price of the tea was loaded with a sum of 8*d.* per pound, the total price per pound being 2*s.* 4*d.*:—

Held, that s. 4 of the Life Assurance Companies Act, 1870, was disregarded, for the 8*d.* per pound was not a separate sum capable of being carried to a separate fund appropriated for the exclusive benefit of the assured pensioners (as required by that section in the case of "a company transacting other business besides that of life assurance"), but that the 2*s.* 4*d.* per pound was a contributory sum for securing two benefits—namely, the present receipt of one pound of tea, and the expectation of a future sum of money contingent upon widowhood.

The N. Co., which carried on the joint business of tea-dealing and granting pensions to insured customers in case of widowhood, became insolvent and unable to pay the pensions. On a petition to wind up the N. Co., that company submitted, as an alternative to winding-up, a scheme which involved that a new company called the N. T. Co. should sell its tea through the agents of the N. Co. to the insured customers, and should pay 75 per cent. of the loading (6*d.* per pound) to the N. Co., which should, as between the two companies, be the insurer of the insured customers:—

Held, that the scheme, being a provision by which the insured customers were to enter into new contracts with a new company and as the result should be entitled to a reduced benefit from their contracts with the old company, was

not authorized by s. 22 of the Life Assurance Companies Act, 1870.

Semble, that although absolute arithmetical equality is not required by s. 22, what the section allows is the reduction of all the contracts of the company to the relief of the common debtor, and that a scheme which proceeds upon a principle of inequality of reduction is not within the Act. *In re* NELSON & Co. - - **Buckley J. 551**

14. —— *Winding-up—Private Examination—Costs of Persons examined—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

An examination under s. 115 of the Companies Act, 1862, is a "proceeding in the Supreme Court" within the meaning of the Judicature Act, 1890.

The Court has, therefore, jurisdiction under the Act of 1890 to order the costs—as distinguished from the expenses—of a person examined to be paid by the person who procured the examination; but, *semble*, not where the examinee is a mere witness, and not a person with whom litigation is pending or intended.

A., a creditor of a company in winding-up, and B., a contributory, and other contributories took out a summons for liberty to issue a misfeasance summons against the directors of the company, and for liberty to examine such persons as they might be advised under s. 115 of the Companies Act, 1862.

On this summons an order was made giving liberty to examine W. and X., and to apply for leave to issue a misfeasance summons after the examination was concluded.

A summons was then issued for the examination of W. and X., and at their examination they employed solicitors and counsel.

A misfeasance summons was then issued by A. and B. against W. and X., who were officers of the company, but was dismissed with costs, which were taxed and paid.

W. and X. then applied for an order that A. and B. should pay the applicants their costs incurred in connection with their examination and being represented thereat by counsel:—

Held, that there was jurisdiction under s. 5 of the Judicature Act, 1890, to make the order, and that, having regard to the object of the examination and the position of the applicants as intended litigants, the order must be made. *In re* APPLETON, FRENCH & SHRAFTON, LIMITED. **Warrington J. 749**

15. —— *Winding-up (Voluntary)—Costs of Outside Litigation—Action brought against Company before Winding-up.*

Where there is a winding-up of a company (whether compulsory or voluntary) all claims of creditors, including those in respect of costs, ought primâ facie to be dealt with in the winding-up in accordance with the rules applicable to the distribution of the assets; but if an action is pending to which the company is a party, and the company by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, and must in case of failure pay the costs in full.

C. brought an action against a company for

COMPANY—*continued.*
damages for breach of contract. After a day had been fixed for the trial the company passed an extraordinary resolution for voluntary winding-up. Within a week afterwards C. wrote to the liquidator asking whether he was prepared to admit C.'s claim in whole or in part. The liquidator replied that he could not admit the claim. At the trial C. recovered judgment for damages and costs:—
Held, that the liquidator had adopted the defence of the action, and that C.'s costs of it must be paid in full out of the assets of the company.
Bailey and Leetham's Case, (1869) L. R. 8 Eq. 94, followed.
In re Thurso New Gas Co., (1889) 42 Ch. D. 486, distinguished. *In re* WENBORN & Co.
Buckley J. 413

—— Electric lighting.
See under ELECTRIC LIGHTING.

COMPENSATION—Election to take property as against will—Amount of compensation, at what date to be ascertained - **16**
See ELECTION.

COMPOUND SETTLEMENT — Appointment of trustees of, for purposes of Settled Land Acts - - - - - **712**
See SETTLED LAND. 1.

COMPROMISE — Beneficiaries — Agreement — Family solicitor—Common agent—Mistake of law and fact — Setting aside compromise - - - - **704**
See WILL. 2.

—— Consent order, Effect of—Waiver of rights—Election of selling partner to affirm sale - - - - - **140**
See PARTNERSHIP. 2.

—— Trustee, Compromise with one—Release pro tanto of the others—Right to prove in the bankruptcy of another trustee **20**
See TRUSTEE. 5.

CONCEALMENT—Suppression of material facts — Non-disclosure — Subsequent knowledge by selling partner - - **140**
See PARTNERSHIP. 2.

CONDITION—Marriage, Restraint of—Validity—Forfeiture—Condition subsequent **96**
See SETTLEMENT. 1.

—— Precedent—Charity, Gift to—Remoteness—Perpetuity — Postponement of enjoyment - - - - - **669**
See WILL. 5.

CONSENT — Condition subsequent — Validity — Restraint of marriage - - **96**
See SETTLEMENT. 1.

CONSENT ORDER — Effect of — Affirmation of transaction—Waiver of rights—Estoppel
See PARTNERSHIP. 2. **140**

CONTINGENT REMAINDER—Realty—Remoteness—Rule against perpetuities - **535**
See WILL. 10.

CONTRACT — *Executed Contract — Rescission — Misrepresentation—Absence of Fraud—Delay.*
The Court will not grant rescission of an executed contract for the sale of a chattel or chose in action on the ground of an innocent misrepresentation:—
In order for the plaintiff to succeed in such a case fraud must be proved.
Wilde v. *Gibson*, (1848) 1 H. L. C. 605, 632; 73 R. R. 191, 209, *Brownlie* v. *Campbell*, (1880) 5 App. Cas. 925, and *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.*, (1867) L. R. 2 Q. B. 580, applied. SEDDON *v.* NORTH EASTERN SALT COMPANY, LIMITED **Joyce J. 326**

—— Building contract—Certificate of architect—Finality - - - - **278**
See BUILDING CONTRACT.

—— Gaming and wagering contract—Interest on sums deposited as cover—Proof for interest - - - - **307**
See COMPANY. 12.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

—— Water supply to adjoining district—Sanction of Local Government Board **53**
See DISTRICT COUNCILS.

CONVERSION—Power to postpone—"Residuary trust funds"—Wasting securities—Enjoyment in specie - - - **233**
See WILL. 11.

CONVEYANCING AND LAW OF PROPERTY—Conveyance—Implied covenants for title—Breach—Damages - - **316**
See VENDOR AND PURCHASER 1.

—— Interesse termini — Underlease exceeding original term—Lessee's right to distrain
See DISTRESS. **46**

—— Power of appointment — Bankruptcy of donee—Capacity of trustee to release power - - - - - **94**
See POWER OF APPOINTMENT.

COPIES—Right to take—Discovery—Production and inspection of documents - **505**
See PRACTICE. 1.

"COPY"—Picture—Infringement—Reproduction of substantial part - - - **519**
See COPYRIGHT.

COPYRIGHT —*Picture — Infringement—"Copy" —Reproduction of Substantial Part—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 11.
The plaintiff was the owner of the copyrights in several works of art, including an oil-painting of which the principal feature was the winged figure of Psyche, and his business consisted in reproducing these copyright works in various forms and sizes by means of photographic processes and selling the reproductions. The plaintiff complained that a very rough photographic illustration which appeared in the advertisement portion of a well-known magazine was an infringement of his copyright in this picture. The illustration, which was diminutive and was devoid of artistic merit, contained a rude reproduction of the female figure, but omitted a portion of the background of the picture. The defendants, who were vendors of the magazine, on becoming aware of the alleged infringement, took steps to have

COPYRIGHT—*continued.*
the illustration torn out before selling any further copies:—
Held, that the illustration was an infringement of the plaintiff's copyright, inasmuch as it tended to prevent the sale of the plaintiff's goods by familiarizing the public with a base form of reproduction; and judgment was given for the plaintiff for a farthing damages and costs. HANFSTAENGL *v.* W. H. SMITH & SONS
Kekewich J. 519

CORPORATION—Power to appoint new trustees —Appointment of corporation jointly with individual - - - 229
See TRUSTEE. 2.

COSTS—Company—Costs of outside litigation—Action brought against company before winding-up - - - - 413
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—— Company—Winding-up—Private examination—Costs of persons examined 749
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—— Forfeiture — Ejectment — Mortgagee of underlease—Relief—Parties - 739
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—— Married woman plaintiff — Restraint on anticipation—Receiver - - 593
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—— Reinvestment in land — Costs of lease creating ground-rent - - 403
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—— Repayment of costs of litigation—Solicitor and client costs—Indemnity—Interest
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—— Taxation—Public body—Right to elect
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—— Taxation—Third party - - 345
See SOLICITOR. 2.

—— Trustees served with notice of appeal—Appearance by counsel — Will — Construction—Costs—Taxation - 478
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COUNCILS—Contracts—Water supply to adjoining district—Sanction of Local Government Board - - - - 53
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COUNTY COUNCIL—Main road—Maintenance and repair—Embankments—Mandatory order - - - - - 336
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COVENANT — Conveyance — Implied covenants for title—Breach—Damages - 316
See VENDOR AND PURCHASER. 1.

—— Not to assign or underlet without licence—Licence not to be "unreasonably withheld" - - - - 456
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—— Restrictive covenants—Title by possession —Notice—Acceptance of less than forty years' title - - - - 391
See VENDOR AND PURCHASER. 3.

—— To settle after-acquired property—Property purchased with accumulations of income
See SETTLEMENT. 2. 200

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—— To settle wife's after-acquired property—Construction—"Become entitled" 4
See SETTLEMENT. 3.

CREDITOR—Proof for interest—Solvent company — Gaming and wagering contract — Interest on sums deposited as cover 307
See COMPANY. 12.

DAMAGES—Conveyance—Implied covenants for title—Breach - - - 316
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—— Light—Obstruction — Nuisance—Cause of action—Injunction or damages - 480
See LIGHT AND AIR.

—— River, Pollution of—Injunction—Nuisance —Continuance of injury - - 205
See RIVER.

DEBENTURE—Floating security — No money payable on debenture — Jeopardy — Receiver - - - - 576
See COMPANY. 2.

—— Transfer or new issue—Debentures paid off and handed back to company with blank transfers - - - - 283
See COMPANY. 3.

DEED — *Operation — All Estate Clause — Conveyance by Husband and Wife of Moiety of Wife's Land — Husband's Rent-charge not mentioned—Release or Grant—Law of Property Amendment Act*, 1859 (22 & 23 *Vict. c.* 35) *s.* 10.
By a voluntary settlement of 1868 a husband and wife and each of them did "grant release dispose of and confirm" a moiety of the wife's hereditaments "and all the estate right title interest property claim and demand" of either of them in, to, and out of the same to trustees and their heirs on certain trusts.
The husband was entitled to a rent-charge issuing out of the hereditaments, but it was not mentioned in the settlement. The settlement contained no covenants for title:—
Held, explaining and applying *Drew* v. *Earl of Norbury*, (1846) 9 Ir. Eq. Rep. 171, 177; 3 J. & Lat. 267, 284; 72 R. R. 62, and *Johnson* v. *Webster*, (1854) 4 D. M. & G. 474, 488, that the settlement operated by way of release and not by way of grant of the rent-charge, and that as the husband and wife, the owners of the unsettled moiety of the hereditaments, had concurred, that moiety, by virtue of the Law of Property Amendment Act, 1859, s. 10, remained subject to the entire charge.
Booth v. *Smith*, (1884) 14 Q. B. D. 318, 321, followed. PRICE *v.* JOHN Swinfen Eady J. 744

—— Execution of deed — Lunatic so found—Lucid interval - - - 160
See LUNACY.

DEEDS—Non-production of title-deeds—Fraudulent solicitor—Postponement of legal mortgage - - - - 632
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DELAY—Executed contract — Rescission—Misrepresentation—Absence of fraud 326
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DISMISSAL—Master—Public elementary school
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—— Servant—Company—Voluntary liquidation —Agreement of service—Resolution to wind up - - - - 357
See COMPANY. 10.

DISSOLUTION — Company—Voluntary winding-up—Stay of proceedings - - 352
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DISTRESS—*Lessee and Underlessee — Original Lease—Reversionary Lease—Interesse Termini—Underlease exceeding Original Term — Lessee's Right to distrain—Landlord and Tenant Act*, 1730 (4 *Geo.* 2, *c.* 28), *s.* 5—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 44.

As a reversionary lease merely creates an interesse termini until entry thereunder, it does not enlarge the term of the original lease.

Smith v. *Day*, (1837) 2 M. & W. 684; 46 R. R. 747; *Doe* v. *Walker*, (1826) 5 B. & C. 111; 29 R. R. 184; *Hyde* v. *Warden*, (1877) 3 Ex. D. 72; and *Joyner* v. *Weeks*, [1891] 2 Q. B. 31, followed.

If a lessee with an original lease and a reversionary lease or an agreement therefor underlets the premises for a term exceeding the original lease, he cannot distrain for rent during the original lease either at common law for want of a reversion, or under the Landlord and Tenant Act, 1730, s. 5, or the Conveyancing Act, 1881, s. 44.

Parmenter v. *Webber*, (1818) 8 Taunt. 593; 20 R. R. 575; *Preece* v. *Corrie*, (1828) 5 Bing. 24; 30 R. R. 536; and *Beardman* v. *Wilson*, (1868) L. R. 4 C. P. 57, followed and applied. LEWIS *v.* BAKER - - - **Swinfen Eady J. 46**

DISTRICT COUNCILS—*Contracts — Water Supply to adjoining District — Sanction of Local Government Board — Particular Area — Penalty Clause—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 61, 174.

Sect. 61 of the Public Health Act, 1875, merely empowers the Local Government Board to sanction the supply of water by the local authority of one district to the local authority of an adjoining district, and does not require them to consider the terms of the agreement between the local authorities.

An agreement for the sale of water by an urban authority to a rural authority does not require a penalty clause under s. 174, sub-s. 2, as that sub-section is confined to cases where work, materials, matters, or things are to be furnished, had, or done to or for an urban authority for a price to be paid by that authority. SOOTHILL UPPER URBAN DISTRICT COUNCIL *v.* WAKEFIELD RURAL DISTRICT COUNCIL **Swinfen Eady J. 53**

DIVORCE—Trust for wife if she shall "survive" her "coverture" — Determination of coverture by decree for dissolution of marriage - - - - 11
See SETTLEMENT. 7.

DUTY—Public revenue.
See under REVENUE.

EASEMENT—Undisclosed easement—Defect of title appearing on conveyance - 316
See VENDOR AND PURCHASER. 1.

ECCLESIASTICAL LAW — Cathedral church—Commissioners — Exemption — Endowment for minor canons - - 442
See CHARITY. 1.

—— Churchyard Gift for maintenance of — Mortmain—Statute—Implied repeal 279
See CHARITY. 2.

EDUCATION.
See under SCHOOLS.

EJECTMENT—Forfeiture—Mortgagee of underlease—Relief—Parties—Costs - 739
See LANDLORD AND TENANT. 3.

ELECTION—*Compensation—Election to take Property as against Will—Amount of Compensation, at what Date to be ascertained.*

Where a beneficiary under a will, being put to his election, elects to take against the will, the amount of the compensation payable to the legatees who are disappointed by the election is to be ascertained at the date of the death of the testator, and not at the time when the election is made. *In re* HANCOCK. HANCOCK *v.* PAWSON **Kekewich J. 16**

—— Appointment void for remoteness — Will power - - - - 191
See SETTLEMENT. 6.

—— Costs—Taxation—Public body — Right to elect - - - - - 290
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—— Partner's share to co-partner, Sale of one—Election by selling partner to affirm sale—Time for election - - 140
See PARTNERSHIP. 2.

—— Power—Appointment—Perpetuity - 256
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ELECTRIC LIGHTING—*Company incorporated under Companies Acts—General Powers—Special Statutory Powers—Statutory Prohibition against supplying Electricity beyond Statutory Areas — Statutory Power to erect Generating Station outside Statutory Areas—Supplying Electricity outside Statutory Areas — Metropolitan Electric Lighting Act*, 1889 (52 & 53 *Vict. c. cxcvi.*), *s.* 5 —*Metropolitan Electric Supply Company Act*, 1898 (61 & 62 *Vict. c. ccxxxv.*), *ss.* 2, 16.

In 1889 a limited company, formed under the Companies Acts for the purpose of generating and supplying electric energy, obtained a special Act and certain provisional orders of the Board of Trade empowering them to supply electric energy in three specified areas within the administrative county of London. The special Act and the orders contained clauses in identical terms prohibiting the undertakers from supplying energy or erecting electric works beyond their statutory areas, except by the authority of Parliament or under a licence from the Board of Trade. In 1898 the company, being unable to supply the demands of their customers in their statutory areas from their generating stations in those areas, obtained another special Act authorizing them to erect generating works in an urban district outside the county of London. In 1903 the company, purporting to act under the

ELECTRIC LIGHTING—*continued.*
general powers in their memorandum of association, commenced to supply energy from their works in the urban district to a railway company in that district. In an action by the Attorney-General, at the relation of the local authority of the urban district, to restrain the company from so doing:—
Held, that the prohibition in the Act of 1889 was not limited to the administrative county of London, but was general, and that the company were acting in contravention thereof.
Decision of Farwell J., [1905] 1 Ch. 24, affirmed. ATTORNEY-GENERAL *v.* METROPOLITAN ELECTRIC SUPPLY COMPANY - - **C. A. 757**

EMBANKMENTS—County council—Main road—Maintenance and repair—Mandatory order - - - - **336**
See LOCAL GOVERNMENT.

EQUITABLE ESTATE IN FEE—Limitations—No words of inheritance - - **191**
See SETTLEMENT. 6.

EQUITABLE MORTGAGE — Priority—Notice—Legal mortgage—Prior equitable mortgage—Non-production of title-deeds
See MORTGAGE. 3. **632**

ESTATE DUTY — Legacies given "free from duty"—Deficient estate—Abatement of legacies - - - - **726**
See WILL. 6.

—— Testamentary expenses—Mixed fund **82**
See WILL. 1.

ESTATE TAIL—To last survivor of class—Legal contingent remainder — Remoteness — Rule against perpetuities - - **535**
See WILL. 10.

ESTOPPEL—Negligence—Liability of company—Duty of company towards third parties—Alteration of position induced by conduct - - - - **646**
See COMPANY. 8.

—— Waiver of rights—Election by selling partner to affirm sale - - - **140**
See PARTNERSHIP. 2.

EVIDENCE—Unstamped agreement - **419**
See COMPANY. 6.

EXAMINATION — Company — Winding-up — Private examination—Costs of persons examined - - - - **749**
See COMPANY. 14.

EXECUTION—Lunatic so found—Lucid interval—Execution of deed - - **160**
See LUNACY.

EXECUTOR—*Retainer — Loan by Wife to Husband—Wife appointed Executrix of Husband—Insolvent Estate—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10 — *Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.
Sect. 3 of the Married Women's Property Act, 1882, does not affect the right of retainer of a married woman who is the executrix of her deceased husband in respect of a loan made by her to him for the purposes of his business.
Though that section, in combination with

EXECUTOR—*continued.*
s. 10 of the Judicature Act, 1875, prevents a wife from proving for such a loan in the administration of her deceased husband's estate (if insolvent) in competition with his creditors for value, yet, if she is her husband's executrix, she can as against those creditors retain the amount of the loan out of assets in her hands as executrix.
In re May, (1890) 45 Ch. D. 499, and *In re Leng*, [1895] 1 Ch. 652, followed, *In re* AMBLER. WOODHEAD *v.* AMBLER - - - **C. A. 697**

EXONERATION—Charge of debts and funeral and testamentary expenses on realty—Non-exoneration of personalty - **547**
See WILL. 4.

FIDUCIARY RELATION — Misrepresentation—Concealment — Sale of one partner's share to co-partner - - **140**
See PARTNERSHIP. 2.

FINANCE ACTS — Settlement estate duty — Legacies given "free from duty" — Deficient estate—Abatement of legacies
See WILL. 6. **726**

—— Testamentary expenses — Estate duty — Mixed fund - - - - **82**
See WILL. 1.

FINE ARTS COPYRIGHT.
See under COPYRIGHT.

FIXTURES—Right of removal—Tenant for life and remainderman - - **406**
See LANDLORD AND TENANT. 2.

FLOATING SECURITY—No money payable on debenture—Jeopardy—Receiver - **576**
See COMPANY. 2.

FOREIGN COUNTRY — British subject's holograph will in accordance with law of foreign country in which made—Effect on English leaseholds - - **584**
See WILL. 3.

FORFEITURE — Ejectment — Mortgagee of underlease—Relief—Parties—Costs **739**
See LANDLORD AND TENANT. 3.

—— Marriage, Restraint of — Condition subsequent—Validity - - - **96**
See SETTLEMENT. 1.

FRAUD — Executed contract — Rescission—Misrepresentation — Absence of fraud — Delay - - - - **326**
See CONTRACT.

—— Fraudulent solicitor — Postponement of legal mortgage—Priority—Non-production of title-deeds - - - **632**
See MORTGAGE. 3.

—— Jointure—Bargain between husband and wife—Benefit to husband — Fraud on power - - - - **126**
See JOINTURE.

—— Mistake by company's secretary—Fraud of transferor—Loss, Proximate cause of
See COMPANY. 8. **646**

GAMING—Creditor—Proof for interest—Solvent company—Gaming and wagering contract—Interest on sums deposited as cover - - - - 307
See COMPANY. 12.

GARNISHEE—Order absolute—Judgment creditor—Mistake—Setting aside - 432
See PRACTICE. 3.

GOODWILL—Stockbroking business—Dissolution—Asset—Sale—Division of assets
See PARTNERSHIP. 1. 466

GRANT—Letters of administration.
See under ADMINISTRATION.

—— Release or grant—Conveyance by husband and wife of moiety of wife's land—Husband's rent-charge not mentioned
See DEED. 744

GROUND-RENTS—Costs of lease creating—Reinvestment in land - - 403
See LANDS CLAUSES ACTS.

—— Investment by trustees—Breach of trust—Purchase of leasehold ground-rents
See WILL. 7. 515

HOLOGRAPH WILL—British subject's holograph will in accordance with law of foreign country in which made—Effect on English leaseholds - - 584
See WILL. 3.

HUSBAND AND WIFE—*Costs—Married Woman Plaintiff—Dismissal of Action with Costs—Order for Payment out of separate Property notwithstanding Restraint on Anticipation—Receiver—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

In an action by a married woman, on an application for an order, under s. 2 of the Married Women's Property Act, 1893, for payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, the onus is on the married woman to shew why the order should not be made. PAWLEY *v.* PAWLEY
Buckley J. 593

—— Bargain between husband and wife—Benefit to husband—Fraud on power - 126
See JOINTURE.

—— Deed—Operation—All estate clause—Conveyance by husband and wife of moiety of wife's land—Husband's rent-charge not mentioned—Release or grant 744
See DEED.

—— Executor—Retainer—Loan by wife to husband—Wife appointed executrix of husband—Insolvent estate - 697
See EXECUTOR.

—— Marriage settlement.
See under SETTLEMENT.

IMPLICATION—Life estate by—Realty—"What is left"—Intestacy - - 378
See WILL. 9.

IMPOUND—Overpayments—Adjustment—Trustee also a beneficiary—Right to impound - - - - 76
See TRUSTEE. 1.

INCOME—Capital or—"Residuary trust funds"—Wasting securities—Enjoyment in specie - - - - 233
See WILL. 11.

INDEMNITY—Repayment of costs of litigation—Solicitor and client costs—Interest
See VENDOR AND PURCHASER. 1. 316

INFRINGEMENT—Copyright.
See under COPYRIGHT.

—— Patent.
See under PATENT.

INJUNCTION—Light—Obstruction—Nuisance—Cause of action—Injunction or damages - - - - 480
See LIGHT AND AIR.

—— Nuisance—Pollution of river—Continuance of injury - - - - 205
See RIVER.

INSOLVENT ESTATE—Retainer—Loan by wife to husband—Wife appointed executrix of husband - - - - 697
See EXECUTOR.

INSPECTION—Discovery—Production and inspection of documents—Right to take copies - - - - 505
See PRACTICE. 1.

INSURANCE, LIFE—*Policy—Proposal—Misrepresentation—Avoidance—Mistake as to Age of Assured—Acceptance of Premiums after Knowledge of Mistake—Affirmance of Contract.*

A policy of life assurance was granted upon the basis of a proposal which concluded with a declaration that the answers given in the proposal were true to the best of the proposer's knowledge and belief, and an agreement that the proposal and declaration should be the basis of the contract, and that if it should thereafter appear that the proposer had made any untrue statement therein the policy should be void and the premiums forfeited. In the proposal the assured made a mistake as to her age, and stated that she was three years younger than she was. The policy, after reciting the declaration and the statement by the assured as to her age, evidence of which the insurance company required to be produced, provided for the payment by the company of the policy moneys upon proof of the death of the assured, or of her having attained the age of sixty years, and it contained a proviso for avoidance of the policy and forfeiture of the premiums in the event of the policy having been obtained by wilful misrepresentation. After discovery of the mistake as to the age of the assured the company accepted two annual premiums:—

Held, (1) following *Fowkes* v. *Manchester and London Life Assurance and Loan Association*, (1863) 3 B. & S. 917, that the declaration was to be read with the policy, and that the company were not entitled to avoid the policy and forfeit the premiums unless the statement in the proposal was designedly untrue, although upon the discovery of the mistake they might have declined to continue the policy upon returning the back premiums; (2) that by accepting premiums after knowledge of the facts they must be taken to have affirmed the policy as it stood, and that consequently they were bound to pay the policy

INSURANCE, LIFE—*continued.*
moneys upon the assured actually attaining the age of sixty years, and were not entitled to postpone payment until the assured had attained that age upon the assumption of her age at the date of the proposal having been as therein stated. HEMMINGS *v.* SCEPTRE LIFE ASSOCIATION, LIMITED - - - **Kekewich J. 365**

—— Company — Winding-up — Life assurance company—Reduction of contracts **551**
See COMPANY. 13.

INTERESSE TERMINI—Underlease exceeding original term—Lessee's right to distrain
See DISTRESS. **46**

INTEREST—Bonds bearing interest out of profits —Deficiency in interest—Sale of bonds —Tenant for life and remainderman
See COMPANY. 1. **734**

—— Exorbitant interest — "Harsh and unconscionable" - - - - **260**
See MONEY-LENDER.

—— Mortgagee in possession—Right to compound interest—Rests - - **241**
See MORTGAGE. 2.

—— Proof for interest — Solvent company — Gaming and wagering contract—Interest on sums deposited as cover - **307**
See COMPANY. 12.

—— Solicitor and client costs—Indemnity—Repayment of costs of litigation - **316**
See VENDOR AND PURCHASER. 1.

INTESTACY—Realty — "What is left" — Life estate by implication - - **378**
See WILL. 9.

INVESTMENT — Trustees — Breach of trust — Purchase of leasehold ground-rents **515**
See WILL. 7.

INVESTMENT CLAUSE—"Securities," Power to transpose and vary—Implied power to resell purchased real estate - **386**
See VENDOR AND PURCHASER. 4.

JOINT TENANCY—Power to appoint new trustees — Appointment of corporation jointly with individual - - - **229**
See TRUSTEE. 2.

JOINTURE—*Bargain between Husband and Wife —Benefit to Husband—Fraud on Power.*
The donee of a power to jointure may exercise it in favour of his wife in accordance with a bargain by which he himself is benefited, provided this is done, not by diverting from her any part of the jointure itself, but by applying it to its proper use in consideration of his getting something which he is at liberty to take for his own benefit.
A wife may hold a jointure, the whole of which is intended to be enjoyed by herself, though she has obtained it by a post-nuptial bargain with her husband and given him or his creditors as a consideration some interest in her own property. The Court will not inquire into the quantum of the consideration.
A testator devised real estate to certain uses, and declared that it should be lawful for each

JOINTURE—*continued.*
tenant for life under the will, either in contemplation of marriage or after marriage, to charge the hereditaments with the payment of any annual sum not exceeding 300*l.* to any woman whom he should marry for her life. In 1868 the tenant for life married the plaintiff; and in 1882, whilst they were living apart, he, in consideration of 50*l.* paid to him by her, executed a deed whereby he charged the property with the payment to her, if she should survive him, of the yearly sum of 300*l.* for her life. There was evidence that the jointure was not at that time worth 50*l.* The tenant for life died in 1902:—
Held (reversing the decision of Kekewich J.), that the transaction was not a corrupt bargain nor a fraud on the power, but that the widow was entitled to receive the jointure.
Baldwin v. *Roche*, (1842) 5 Ir. Eq. Rep. 110, approved and followed.
Whelan v. *Palmer*, (1888) 39 Ch. D. 648, overruled. SAUNDERS *v.* SHAFTO - - **C. A. 126**

JUDGMENT CREDITOR—Garnishee order absolute—Mistake—Setting aside - **432**
See PRACTICE. 3.

JUDICATURE ACT — Company—Winding-up — Private examination—Costs of persons examined - - - - **749**
See COMPANY. 14.

—— Executor—Retainer—Loan by wife to husband — Wife appointed executrix of husband—Insolvent estate - - **697**
See EXECUTOR.

JURISDICTION — Account — Reopening closed and present transactions - - **260**
See MONEY-LENDER.

—— Charity Commissioners — Exemption — Cathedral church — Endowment for minor canons - - - **442**
See CHARITY. 1.

LANDLORD AND TENANT—*Covenant—Not to assign or underlet without Licence—Licence not to be "unreasonably withheld."*
Where a landlord occupies part of a building with only one entrance and lets off another part with a covenant by the tenant not to assign or underlet without the landlord's licence, such licence not to be "unreasonably withheld," it is reasonable for the landlord, before granting a licence to underlet, to ask for what purpose the portion to be underlet is to be used, and to stipulate for a similar covenant between the undertenant and himself. *In re* SPARE'S LEASE. BERGER *v.* JENKINSON - - - **Swinfen Eady J. 456**

2. —— *Fixtures—Right of Removal—Intention to improve Inheritance—Tenant for Life and Remainderman.*
A tenant for life of settled estates granted a lease for twenty-one years of a steam-mill and machinery. The lessee covenanted that he would at the end of the tenancy sell to the lessor all machinery then on the premises other than the demised machinery; and the lessor covenanted that he would pay for it. The tenant bought additional machinery into and affixed it to the mill. On the expiration of the tenancy the

LANDLORD AND TENANT—*continued.*
tenant for life bought this machinery under the provisions of the lease. He died, and his executrix claimed the machinery thus bought:—

Held, that, as between tenant for life and remainderman, chattels affixed to the soil by the tenant for life for purposes of trade did not become part of the freehold, and might be removed by him. The question must be determined by the intention of the person by whom the chattels were attached; and, in the absence of evidence to shew that the tenant for life intended to make a present to the remainderman, his executrix was entitled to the machinery. *In re* Sir Edward Hulse, Bart. Beattie *v.* Hulse - - - - **Buckley J. 406**

3. —— *Forfeiture — Ejectment—Mortgagee of Underlease — Relief — Parties — Costs— Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *ss.* 210, 211, 212 — *Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 1.

A lessor, having ejected an underlessee for non-payment of ground-rent, mortgagees by submise of the underlease applied for relief under the ordinary equitable jurisdiction and the Common Law Procedure Acts, claiming a direct lease for their mortgage term, on the usual conditions.

The lessor opposed the application on the ground that the lessee and the assignee of the head lease were not parties, and on other grounds which failed.

It appeared that the lease had been assigned by the lessee's trustee in bankruptcy twenty-seven years ago, and that the assignee had not been heard of for twenty-six years, and could not be traced:—

Held, that the above circumstances afforded sufficient reason for not making the lessee and assignee parties as primâ facie required by *Hare* v. *Elms*, [1898] 1 Q. B. 604, and that the mortgagees were entitled to the relief claimed:

Held, also, that the mortgagees must pay the costs of the action, except so far as they had been increased by the lessor resisting their claim to relief, which increased costs must be paid by the lessor.

Howard v. *Fanshawe*, [1895] 2 Ch. 581, 592, followed.

Newbolt v. *Bingham*, (1895) 72 L. T. 852, distinguished. Humphreys *v.* Morten **Swinfen Eady J. 739**

—— Distress — Interesse termini — Underlease exceeding original term—Lessee's right to distrain - - - - 46
See Distress.

LANDS CLAUSES ACTS — *Practice — Costs — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Reinvestment in Land—Ground-rent —Costs of Lease creating Ground-rent.*

The trustees of a charity obtained an order for the reinvestment of the purchase-money for lands of theirs, which had been taken by a corporation under the Lands Clauses Act, in the purchase of land. The contract entered into by the trustees, and approved by the Court, provided that on the conveyance of the land to the trustees they should grant to the vendors a lease for seventy-three years at a ground-rent, and that each party should pay their own costs of the lease:—

Held, that the corporation were not bound to pay the trustees' costs of the lease as part of the costs of reinvestment. *Ex parte* Trustees of Thavie's Charity - - **Farwell J. 403**

LAPSE—Two residuary gifts—Lapse of legacy
See Will. 8. **427**

LAW OF PROPERTY ACT — Conveyance by husband and wife of moiety of wife's land—Husband's rent-charge not mentioned—Release or grant - - **744**
See Deed.

LEASE — Mining lease—Power to let down surface—Support—Tenant for life **460**
See Settled Land. 2.

—— Reinvestment in land — Costs of lease creating ground-rent - - **403**
See Lands Clauses Acts.

LEASEHOLD GROUND-RENTS — Purchase of—Investment by trustees—Breach of trust
See Will. 7. **515**

LEASEHOLDS — "Personal estate" — British subject's holograph will in accordance with law of foreign country in which made—Effect on English leaseholds **584**
See Will. 3.

—— Trustee, Reversion purchased by — Leaseholds forming part of trust estate—No right of renewal — Ownership of the fee - - - - - **620**
See Trustee. 4.

LEGACY: *See* under Will.

LETTERS OF ADMINISTRATION: *See* under Administration.

LIFE INSURANCE.
See under Insurance, Life.

LIGHT AND AIR—*Obstruction—Ancient Lights — Nuisance — Cause of Action — Injunction or Damages.*

In an action for obstruction of ancient lights by the owner and occupier of a suburban dwelling-house it appeared that the room principally affected was lighted by two windows, one of which only was obstructed by the defendant's building, and that as to that there was still left more than 45° of light. Kekewich J. found that although the room was still well lighted there was a large obstruction of light by reason of the defendant's building, and that the letting and selling value of the plaintiff's premises had been substantially diminished, and he held that the obstruction constituted an actionable nuisance within *Colls* v. *Home and Colonial Stores, Ld.*, [1904] A. C. 179, and granted a mandatory injunction:—

Held, by the Court of Appeal (Romer L.J. dissenting), that the plaintiff had a cause of action, but that the remedy ought to be damages.

Held, by Romer L.J., that the plaintiff had no cause of action.

Per Vaughan Williams L.J.: The effect of *Colls* v. *Home and Colonial Stores, Ld.*, is that in order to support an action of nuisance by obstruction of ancient lights the obstruction, in the case

LIGHT AND AIR—*continued.*

of a dwelling-house, must be such as sensibly to interfere with the comfortable and convenient occupation of the plaintiff's premises according to the ordinary notions of the citizens of this country, and in determining that question the quantity of light coming from other sources is to be taken into consideration; but the mere fact that the quantity of light finding access to a particular room after an obstruction amounts to a sufficiency for the purpose for which the room was designed will not necessarily exclude the conclusion that the obstruction has interfered with the comfort and convenience or usefulness of the room according to the ordinary notions of mankind.

Per Cozens-Hardy L.J.: *Semble, Colls* v. *Home and Colonial Stores, Ld.*, only decides that an obstruction which neither lessens the letting or selling value of the house, nor materially affects the comfort or convenience of the occupier, does not in law justify an action, even though a large proportion of light previously enjoyed has been lost. KINE *v.* JOLLY - - - C. A. 480

LIGHTING—Electric lighting.
See under ELECTRIC LIGHTING.

LIMITATIONS—Equitable estate in fee—No words of inheritance - - 191
See SETTLEMENT. 6.

LIMITATIONS, STATUTE OF—Restrictive covenants—Title by possession—Notice—Acceptance of less than forty years' title - - - - - 391
See VENDOR AND PURCHASER. 3.

LITERARY AND SCIENTIFIC INSTITUTIONS—*User for Social Purposes—Billiards—Repairs—Borrowing Powers—Literary and Scientific Institutions Act*, 1854 (17 & 18 *Vict. c.* 112), *ss.* 18, 19, 33.

The Literary and Scientific Institutions Act, 1854, does not authorize the establishment of institutions for the purpose of recreation or enjoyment, *e.g.*, the playing of billiards as distinguished from the literary, scientific, and other instructional purposes specified in s. 33 of the Act.

An institution established under the Act has no implied general power of mortgaging or borrowing money, and its power to mortgage or charge its property is limited to the purposes mentioned in s. 19.

Money cannot be borrowed on mortgage by a literary or scientific institution for the purpose of erecting a billiard-room, although it may be so borrowed for the purpose of making necessary repairs of the institution's buildings. *In re* BADGER. MANSELL *v.* VISCOUNT COBHAM
Buckley J. 568

LOCAL GOVERNMENT—*County Council—Main Road—Maintenance and Repair—Embankments—Retaining and Supporting Walls—Mandatory Order—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.

The liability imposed upon county councils by s. 11 of the Local Government Act, 1888, of maintaining and repairing main roads is general, it being left to them to determine the best means of discharging that liability. The Court will not

LOCAL GOVERNMENT—*continued.*

prescribe what particular works or repairs are necessary for the maintenance of the roads.

No mandamus will lie against a local authority to do any particular works.

Whether any liability, as distinct from duty, is imposed upon county councils by the section, *quære.*

ATTORNEY-GENERAL *v.* STAFFORDSHIRE COUNTY COUNCIL - - - - Joyce J. 336

—— Contracts—Water supply to adjoining district—Sanction of Local Government Board - - - - 53
See DISTRICT COUNCILS.

—— River, Pollution of—Injunction—Nuisance—Continuance of injury - - 205
See RIVER.

LONDON—Electric lighting—Statutory prohibition against supplying electricity beyond statutory areas—Supplying electricity outside statutory areas - - 757
See ELECTRIC LIGHTING.

LUNACY—*Lunatic so found—Lucid Interval—Power to dispose of Property—Execution of Deed—Power of Court to direct Trial of Validity or Perpetuation of Testimony—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 123, 341.

When a person has been found lunatic by inquisition, so long as the inquisition has not been superseded, but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property.

The Court will not recognise such a deed even by directing proceedings to be taken to try the question of its validity or to perpetuate testimony as to the state of the lunatic's mind when it was executed, but will treat the deed as entirely null and void.

The difference between the execution of a deed and the execution of a will by a lunatic so found explained.

Ex parte Sir Benjamin Wright, (1683) 1 Vern. 155, considered. *In re* WALKER (A LUNATIC SO FOUND) - - - - - C. A. 160

—— Power of appointment—Bankruptcy of donee—Capacity of trustee to release power
See POWER OF APPOINTMENT. 94

MAINTENANCE—Churchyard, Gift for maintenance of—Mortmain—Statute—Implied repeal - - - - 279
See CHARITY. 2.

—— County council—Main roads—Maintenance and repair—Mandatory order - 336
See LOCAL GOVERNMENT.

MANDATORY ORDER—County council—Main roads—Maintenance and repair - 336
See LOCAL GOVERNMENT.

MARRIAGE—Condition—Validity—Restraint of marriage—Forfeiture—Condition subsequent - - - - - 96
See SETTLEMENT. 1.

—— Dissolution of.
See under DIVORCE.

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER—Dismissal—Public elementary school
See SCHOOLS. 180

MASTER AND SERVANT — Company—Voluntary liquidation—Agreement of service—Resolution to wind up—Dismissal of servant - - - - 357
See COMPANY. 10.

MEETINGS—Special resolution—Notice of both meetings in one document—Special clause in articles of association - 609
See COMPANY. 4.

MEMORANDUM AND ARTICLES OF ASSOCIATION—Company.
See under COMPANY.

METROPOLIS.
See under LONDON.

MINE—Contract of sale—Power to rescind where objection as to title insisted on—Absence of title to mines in property sold 603
See VENDOR AND PURCHASER. 2.

—— Lease of power to let down surface—Support to surface—Tenant for life - 460
See SETTLED LAND. 2.

MISFEASANCE—River, Pollution of—Injunction—Nuisance—Continuance of injury
See RIVER. 205

MISJOINDER — Parties — Public elementary school - - - - 180
See SCHOOLS.

MISREPRESENTATION — Executed contract—Rescission—Absence of fraud—Delay
See CONTRACT. 326

—— Policy—Mistake as to age of assured — Acceptance of premiums after knowledge of mistake - - - - 365
See INSURANCE, LIFE.

MISTAKE—As to age of insured—Acceptance of premiums after knowledge of mistake
See INSURANCE, LIFE. 365

—— Judgment creditor—Garnishee order absolute—Setting aside - - 432
See PRACTICE. 3.

MONEY-LENDER—*Borrower—Loan Transaction—Absence of Risk—Exorbitant Interest—"Harsh and unconscionable"—Reopening closed and present Transactions—Jurisdiction—Account—Form of Order—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.

In 1903 S., a money-lender, advanced 2000*l.* to A., the managing director of a brewery company, on a promissory note for 3300*l.*, repayable by monthly instalments, but the whole sum to be immediately payable on default in payment of any instalment. S. was aware that A. was a man of means and that the advance would be without risk. At the time of the advance A.'s business capacity had become somewhat impaired through habits of intemperance, though this was not noticeable by an ordinary observer, and in fact S. believed he was dealing with a competent person.

MONEY-LENDER—*continued.*

A. duly paid the first instalment under the note, but before the next fell due he died from the effects of intemperance. His executor refused to make any further payment on the ground that the loan transaction was "harsh and unconscionable" within the Money-lenders Act, 1900.

In an action by S. against the executor to recover the balance of the note:—

Held, by Kekewich J., that in the circumstances, and especially having regard to the absence of risk, the transaction was "harsh and unconscionable" within s. 1 of the Act, and must be reopened:

Held, further, by Kekewich J., that under the same section a previous 1000*l.* loan transaction between S. and A. in which an excessive rate of interest had been charged, but which had been closed by payment, must also be reopened, although no case as to its having been "harsh and unconscionable" had been raised in the action by the defendant either by counter-claim or otherwise or at the trial.

Judgment was accordingly given entitling S. to repayment only of the sums actually advanced by him to A. under both loans, together with interest at 10 per cent. per annum only. On appeal:—

The Court of Appeal affirmed the judgment of Kekewich J. so far as regarded the subsisting 2000*l.* transaction, but struck out so much of it as related to the closed 1000*l.* transaction as to which no case had been properly raised by the defendant, though without prejudice to his right to bring an action to reopen that transaction if so advised.

Under s. 1 of the Money-lenders Act, 1900, the Court has power when reopening an existing money-lending transaction, to reopen also one that is passed and closed, provided it is relevant to or in some way connected with the existing transactions.

Form of judgment under the Act reopening a loan transaction and directing an account ([1905] 1 Ch. 263). SAUNDERS *v.* NEWBOLD
C. A. 260

MORTGAGE — *Accounts — Redemption—Practice—Mortgagor and Mortgagee—Mortgagee in Possession—Sale of part of the Mortgaged Property—Rents and Profits—Rests.*

In a redemption action against a mortgagee in possession, who has from time to time sold parts of the mortgaged property, where a decree has been made directing the usual accounts and inquiries, but giving no direction as to rests, the mortgagor is not entitled to have rests made in the account of rents and profits even though there may have been sales from time to time.

Thompson v. *Hudson*, (1870) L. R. 10 Eq. 497, is not an authority against that proposition.

Wrigley v. *Gill*, [1905] 1 Ch. 241, followed.
AINSWORTH *v.* WILDING - - Joyce J. 435

2. —— *Accounts — Redemption — Practice — Mortgagor and Mortgagee—Proviso for Capitalization of Interest—Mortgagee in Possession—Right to Compound Interest—Sale of part of the Mortgaged Property—Rests.*

Under a proviso in a mortgage for the capitalization of interest in arrear for twenty-one days,

MORTGAGE—*continued.*
a mortgagee in possession, through the default of the mortgagor, is not entitled, on the accounts being taken, to charge the mortgagor with compound interest, unless he can prove that after crediting the rents received each half-year the interest was actually in arrear at the times specified in the proviso.

Union Bank of London v. *Ingram*, (1880) 16 Ch. D. 53, *Cockburn* v. *Edwards*, (1881) 18 Ch. D. 449, and *Bright* v. *Campbell*, (1889) 41 Ch. D. 388, discussed and distinguished.

The sale by a mortgagee in possession of part of the mortgaged property does not of itself entitle the mortgagor to an account with a general rest of the rents and profits as well as of the proceeds of sale, as on the date of the receipt thereof.

Thompson v. *Hudson*, (1870) L. R. 10 Eq. 497, explained. WRIGLEY *v.* GILL
Warrington J. 241

3. —— *Priority—Notice—Legal Mortgage—Prior Equitable Mortgage—Non-production of Title-deeds—Fraudulent Solicitor—Postponement of Legal Mortgage.*

A purchaser who without requiring delivery or production of the title-deeds takes a title from a mortgagee who has deposited the deeds by way of sub-mortgage is affected with constructive notice of the sub-mortgage, and the legal estate conveyed to the purchaser is in his hands subject to the equitable incumbrance, and this notice will raise a trust to the amount of the sub-mortgage. It is immaterial whether the purchaser employs a solicitor or not, and whether the solicitor, if one is employed, informs the purchaser of the sub-mortgage or not.

B. mortgaged two freehold houses to C., a solicitor, for 2100*l.* C. then deposited the mortgage and title-deeds with his bankers to secure the balance of his banking account, which continued to be overdrawn for more than 10,000*l.* until his bankruptcy in 1902. The bank advisedly omitted to give notice of their security to B. Subsequently B. and C. mortgaged one of the houses to H. for 650*l.*, which was paid to C. in partial discharge of the original mortgage debt, and the house was expressed to be discharged from that mortgage; and they mortgaged the other house to W. for 550*l.* on precisely similar terms. B. also gave C. a second mortgage on both houses to secure 900*l.*, the balance remaining due on the original mortgage. In the three last-mentioned mortgages C. acted as solicitor for all parties, none of whom had any actual knowledge of the bank's sub-mortgage. In an action by the bank to enforce their security:—

Held, that H. and W. were affected with constructive notice of the sub-mortgage, and were respectively trustees of the legal estate for the bank; but

Held, that B. was not bound to require production of the title-deeds on paying off part of the original mortgage debt, and

Semble, that he was not affected with notice of the sub-mortgage and was discharged from liability under the original mortgage to the extent of the two sums of 650*l.* and 550*l.* BERWICK & Co. *v.* PRICE - - Joyce J. 632

MORTGAGE—*continued.*
—— Appointment of trustees of compound settlement for purposes of Settled Land Acts—Definition of such trustees - 712
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—— Lease—Forfeiture—Ejectment—Mortgagee of underlease—Relief—Parties—Costs.
See LANDLORD AND TENANT. 3. 739

MORTMAIN—Gift for maintenance of churchyard—Statute—Implied repeal 279
See CHARITY. 2.

NEGLIGENCE—Liability of company—Duty of company towards third parties—Alteration of position induced by conduct
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NOTICE — Priority — Legal mortgage — Prior equitable mortgage—Non-production of title-deeds - - - - 632
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—— Restrictive covenants—Title by possession—Acceptance of less than forty years' title - - - - - 391
See VENDOR AND PURCHASER. 3.

NUISANCE — Light — Obstruction — Cause of action—Injunction or damages - 480
See LIGHT AND AIR.

—— River, Pollution of — Injunction — Continuance of injury - - - 205
See RIVER.

OBSTRUCTION—Ancient lights.
See under LIGHT AND AIR.

OVERPAYMENTS—Adjustment—Trustee also a beneficiary—Right to impound - 76
See TRUSTEE. 1.

PARTIES—Forfeiture—Ejectment—Mortgagee of underlease—Relief—Costs - 739
See LANDLORD AND TENANT. 3.

—— Practice—Misjoinder—Public elementary school - - - - 180
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—— Practice—Representation of unborn children—Trustee - - - - 96
See SETTLEMENT. 1.

PARTNER—Leaseholds forming part of trust estate—No right of renewal—Reversion purchased by trustee—Ownership of the fee - - - - - 620
See TRUSTEE. 4.

PARTNERSHIP—*Goodwill—Stockbroking Business—Dissolution—Asset of Partnership—Sale—Division of Assets.*

H. & F. carried on business as stockbrokers in London under articles of partnership which contained no mention of goodwill. The term for which the partnership was constituted expired, and the business was carried on by them as partners at will upon the conditions of the articles so far as applicable. H. died, and F. continued to carry on the business. For this purpose he obtained the permission of the committee of the Stock Exchange to use the name of

PARTNERSHIP—*continued.*
the firm. He accounted for H.'s capital, but declined to pay anything in respect of goodwill:—

Held, that the nature of a stockbroker's business was not such that there could not be a saleable goodwill thereof; and that, in the absence of any provisions to the contrary in the articles, the goodwill must be sold and the proceeds accounted for.

Wilson v. *Williams*, (1892) 29 L. R. Ir. 176, distinguished. HILL *v.* FEARIS
Warrington J. 466

2. —— *Sale of one Partner's Share to Co-partner—Duty of Purchasing Partner—Fiduciary Relation—Misrepresentation—Concealment—Suppression of Material Facts—Non-disclosure—Subsequent Knowledge by Selling Partner—Rescission of Contract, Equitable Right to—Action for Fraudulent Representation—Compromise—Consent Order, Effect of—Affirmation of Transaction—Waiver of Rights—Estoppel—Election by Selling Partner to affirm Sale—Time for Election.*

It is clear law that, in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows; and that, unless such information has been furnished, the sale is voidable and may be set aside: *Maddeford* v. *Austwick*, (1826) 1 Sim. 89; 27 R. R. 167.

But if the vendor, on discovering that certain material facts have been concealed from him by the purchaser, and though believing that there has been a concealment of further material facts, nevertheless does acts constituting a deliberate election on his part not to insist on his right to a full disclosure, he is bound by that election, and neither he nor his representatives after his death can afterwards, on discovering the full extent of the concealment, repudiate the sale.

There is no authority for the proposition, and it is contrary to principle, that the duty of full disclosure resting on the partner purchasing from his co-partner is such that the purchasing partner cannot rely on any binding election on the part of the selling partner unless and until full disclosure has been made.

Decision of Kekewich J. affirmed. LAW *v.* LAW - - - - - - C. A. 140

PATENT—*Infringement—Combination—Subject-matter—Repair—Fitting new Component Part.*

A patentee invented a wheel rim of a particular shape which he claimed would hold a sold rubber tyre without pinching and without wires or bands for securing it. He claimed the rim, and also the combination of the rim and the tyre, but not the tyre. A rim would wear out many tyres.

The defendants having made and fitted a new tyre to one of the patentee's rims to replace a worn-out tyre, the patentee sued for infringement of the combination:—

Held, that, even assuming the patent for the rim to be valid, there was no subject-matter in

PATENT—*continued.*
the combination, as it was the only and obvious manner of using the rim and contained no separate merit or invention.

Clark v. *Adie*, (1877) 2 App. Cas. 315, 321, applied.

Held, also, that under the circumstances the defendants' acts only amounted to fair repair.

Dunlop Pneumatic Tyre Co. v. *David Moseley & Sons, Ld.*, [1904] 1 Ch. 612, 621, discussed.

Dunlop Pneumatic Tyre Co. v. *Neal*, [1899] 1 Ch. 807, distinguished. SIRDAR RUBBER CO. *v.* WALLINGTON, WESTON & CO.
Swinfen Eady J. 451

PENALTY CLAUSE—Contracts—Water supply to adjoining district—Sanction of Local Government Board - - 53
See DISTRICT COUNCILS.

PERPETUATION OF TESTIMONY—Power of Court to direct trial of validity or—Lunatic so found—Lucid interval—Execution of deed - - - 160
See LUNACY.

PERPETUITY—Charity, Gift to—Condition precedent—Remoteness—Postponement of enjoyment - - - - 669
See WILL. 5.

—— Power—Appointment—Election - 256
See SETTLEMENT. 4.

—— Realty—Legal contingent remainder—Remoteness—Rule against perpetuities
See WILL. 10. 535

—— Will power—Appointment void for remoteness—Election - - - 191
See SETTLEMENT. 6.

"PERSONAL ESTATE"—Leaseholds - 584
See WILL. 3.

PERSONALTY—Charge of debts and funeral and testamentary expenses on realty—Non-exoneration of personalty - 547
See WILL. 4.

PICTURE—Infringement—"Copy"—Reproduction of substantial part - - 519
See COPYRIGHT.

POLICY—Insurance, Life.
See under INSURANCE, LIFE.

POSSESSION—Title by—Restrictive covenants—Notice—Acceptance of less than forty years' title - - - - 391
See VENDOR AND PURCHASER. 3.

POWER OF APPOINTMENT—*Bankruptcy of Donee—Capacity of Trustee to release Power—Settlement—Limited Power of Appointment—Ultimate Reversion in Donee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 120.

Order of Farwell J., [1904] 2 Ch. 348, discharged by consent.

On the point decided by Farwell J., namely, that the trustee in the bankruptcy of the donee of a limited power of appointment could not release the power for the benefit of the bank-

POWER OF APPOINTMENT—*continued.*
rupt's estate, the Court of Appeal expressed no opinion. *In re* ROSE. HASLUCK *v.* ROSE C. A. 94

—— Independent alternative trusts—Validity of ultimate trusts—Remoteness - 371
See SETTLEMENT. 8.

—— Perpetuity—Election - - - 256
See SETTLEMENT. 4.

—— Power to appoint in favour of a particular class—Donee of power herself a member of the class—Right of donee to appoint to herself - - - - 529
See SETTLEMENT. 5.

—— Remoteness, Appointment void for—Election
See SETTLEMENT. 6. 191

—— Trustees, Power to appoint new—Appointment of corporation jointly with individual - - - - - 229
See TRUSTEE. 2.

POWER OF JOINTURING—Fraud on—Bargain between husband and wife—Benefit to husband - - - - 126
See JOINTURE.

PRACTICE—*Discovery—Production and Inspection of Documents—Right to take Copies—Rules of Supreme Court, Order XXXI., rr.* 14, 15; *Order LXV., r.* 27, *sub-r.* 18.

On the application of the plaintiffs, an order was made for the production at the office of the defendants' solicitor of documents in the possession or power of the defendants. The order further provided that "the applicants, their solicitors and agents, are to be at liberty to inspect and peruse the documents so produced, and to take copies and abstracts thereof and extracts therefrom, as the applicants shall be advised":—

Held, that under this order the plaintiffs were entitled, as they would have been under such an order made in the Court of Chancery before the Judicature Act, to make copies themselves or by their solicitors or agents of the documents produced in accordance with the order.

Sub-rule 18 of rule 27 of Order LXV. has not taken away the right of a litigant who obtains such an order to make copies himself of the documents produced.

The object of that sub-rule is only to fix the amount of the charge to be paid by the inspecting litigant when he formally requires a copy or extracts to be furnished to him by his opponent.

Decision of Joyce J. affirmed. ORMEROD, GRIERSON & Co. *v.* ST. GEORGE'S IRONWORKS, LIMITED - - - - - C. A. 505

2. —— *Service—Amended Writ—Re-service—Personal Service—Non-appearing Defendant—Discretion of Court—Rules of Supreme Court, Order IX., r.* 2; *Order XVI., r.* 13; *Order XVII., r.* 4; *Order XIX., r.* 10; *Order XXVIII., rr.* 1, 10; *Order LXVII., rr.* 4, 5.

There is no hard and fast rule that an amended writ, whatever be the nature of the amendment, must be re-served personally on a defendant who has not appeared to the original writ.

The Rules of the Supreme Court make no provision for the personal service of an amended writ, and therefore rule 4 of Order LXVII. applies, and an amended writ may be served on a defendant who has not appeared by filing it with the proper officer. When this has been done the Court has jurisdiction to proceed to try the action as against such a defendant.

But the Court has a discretion in the matter, and, if it can see that there is any probability of injustice being otherwise done to the absent defendant, it will require that he be served personally with the amended writ—e.g., if the indorsement on the writ has been amended in such a way as substantially to enlarge the relief claimed against him, and to make the writ in effect a new writ:

Per Stirling L.J.: On granting leave to amend a writ the judge can, if he thinks it right to do so, impose the condition that the amended writ shall be served personally on a defendant who has not appeared to the original writ.

An action was brought by a Colonial railway company and the then Governor of the Colony, who in the statement of claim was stated to be suing on behalf of the Government. One of the defendants did not appear to the writ. A change of Governor took place, and, in pursuance of leave given by the Court, the writ was then amended by adding the name of the new Governor as a plaintiff, and the statement of claim was amended by stating that he was suing on behalf of the Government:—

Held, that the non-appearing defendant was sufficiently served by filing the amended writ in pursuance of rule 4 of Order LXVII.

Decision of Swinfen Eady J. reversed.

The Cassiopeia, (1879) 4 P. D. 188, *Webster* v. *Myer*, (1884) 14 Q. B. D. 231, *Gee* v. *Bell*, (1887) 35 Ch. D. 160, *In re Hartley*, [1891] 2 Ch. 121, and *Tilling, Ld.* v. *Blythe*, [1899] 1 Q. B. 557, discussed and explained. JAMAICA RAILWAY COMPANY *v.* COLONIAL BANK - - C. A. 677

3. —— *Setting aside—Judgment Creditor—Garnishee Order Absolute—Mistake.*

A garnishee order, made upon evidence afterwards proved to be mistaken, may be set aside although it has been made absolute and has been acted upon.

Moore v. *Peachey*, (1892) 66 L. T. 198, followed. MARSHALL *v.* JAMES - Joyce J. 432

—— Appeal — Trustees served with notice of appeal—Appearance by counsel—Costs—Taxation—Will—Construction 478
See TRUSTEE. 3.

—— Costs.
See under COSTS.

—— Parties — Misjoinder — Public elementary school - - - - 180
See SCHOOLS.

—— Parties—Representation of unborn children—Trustee - - - - 96
See SETTLEMENT. 1.

—— Solicitors' costs.
See Cases under SOLICITOR.

PREMIUMS.
See under INSURANCE, LIFE.

PRIORITY — Notice — Legal mortgage — Prior equitable mortgage—Non-production of title-deeds - - - - 632
See MORTGAGE. 3.

PRODUCTION OF DEEDS—Non-production of title-deeds—Fraudulent solicitor—Postponement of legal mortgage - 632
See MORTGAGE. 3.

PRODUCTION OF DOCUMENTS — Discovery — Right to take copies - - 505
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PROOF—Bankruptcy of shareholder—Proof in bankruptcy for liability in respect of future calls—Effect as to paying shares up - - - - - 597
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—— Compromise with one trustee — Release pro tanto of the others—Right to prove in the bankruptcy of another trustee 20
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—— Creditor—Proof for interest—Solvent company—Gaming and wagering contract —Interest on sums deposited as cover
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PROSPECTUS — Irregular allotment — Cancellation—Rescission—Ultra vires - 37
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PUBLIC AUTHORITIES PROTECTION—Injunction — Nuisance—Pollution of river — Continuance of injury - - 205
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PUBLIC BODY — Costs — Taxation — Right to elect - - - - 290
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PUBLIC HEALTH—Contracts—Water supply to adjoining district — Sanction of Local Government Board - - 53
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—— River, Pollution of—Injunction—Nuisance —Continuance of injury - - 205
See RIVER.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

REAL PROPERTY LIMITATION — Restrictive covenants—Title by possession—Notice —Acceptance of less than forty years' title - - - - - 391
See VENDOR AND PURCHASER. 3.

RECEIPT—Secretary—Authority to bind company - - - - - 646
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RECEIVER—Floating security—No money payable on debenture—Jeopardy - 576
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—— Married woman plaintiff—Costs—Restraint on anticipation - - - 593
See HUSBAND AND WIFE.

RECONSTRUCTION — Memorandum of association—Sale of assets for 'shares" in new company - - - - 419
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REDEMPTION — Accounts—Mortgagee in possession—Rents and profits—Rests 435
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—— Accounts—Mortgagee in possession—Right to compound interest—Rests - 241
See MORTGAGE. 2.

REGISTRATION—Trade-mark—Invented word —"Absorbine" - - - 1
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—— Transfer of shares — Registering transfer without production of share certificate— Note on certificate—False declaration
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RELEASE—Grant or—Conveyance by husband and wife of moiety of wife's land— Husband's rent-charge not mentioned
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—— Joint and several liability — Compromise with one trustee—Release pro tanto of the others - - - - 20
See TRUSTEE. 5.

—— Power of appointment—Bankruptcy of donee —Capacity of trustee to release power
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REMOTENESS—Appointment void for—Election
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—— Charity, Gift to—Condition precedent — Perpetuity — Postponement of enjoyment - - - - - 669
See WILL. 5.

—— Independent alternative trusts—Validity of ultimate trusts—"Trusts aforesaid" 371
See SETTLEMENT. 8.

—— Power — Appointment — Perpetuity—Election - - - - - 256
See SETTLEMENT. 4.

—— Realty—Legal contingent remainder—Rule against perpetuities - - 535
See WILL. 10.

RENEWAL—No right of—Trustee—Leaseholds forming part of trust estate—Reversion purchased by trustee — Ownership of the fee - - - - 620
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—— Right of renewal—Fixtures — Tenant for life and remainderman - - 406
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RENT-CHARGE — Annuity—Charge on land— Specific devise - - - 82
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—— Conveyance by husband and wife of moiety of wife's land—Husband's rent-charge not mentioned—Release or grant 744
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—— Patent—Infringement—Combination—Fitting new component part - 451
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REPEAL—Statute—Implied repeal—Mortmain—Gift for maintenance of churchyard
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RESCISSION—Contract of sale—Power to rescind where objection as to title insisted on—Absence of title to mines in property sold - - - - - 603
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—— Executed contract—Misrepresentation—Absence of fraud—Delay - - 326
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—— Prospectus—Irregular allotment—Cancellation of allotment—Ultra vires - 37
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"RESIDUARY TRUST FUNDS"—Unauthorized securities—Wasting securities—Enjoyment in specie - - - 233
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RESTRAINT ON ANTICIPATION — Married woman plaintiff—Costs—Receiver 593
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RESTS—Accounts—Redemption—Mortgagee in possession—Rents and profits - 435
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—— Accounts — Redemption — Mortgagee in possession—Right to compound interest
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RETAINER—Executor—Loan by wife to husband—Wife appointed executrix of husband—Insolvent estate - - 697
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REVENUE — Estate duty — Testamentary expenses—Mixed fund - - 82
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—— Settlement estate duty — Legacies given "free from duty"—Deficient estate—Abatement of legacies - - 726
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REVERSION — Purchased by trustee — Leaseholds forming part of trust estate—No right of renewal—Ownership of the fee
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REVOCATION — Letters of administration — Grant of—Will appointing executor—Suppression of will—Revocation of grant—Acts of administrator - - 613
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RIVER — *Injunction — Nuisance — Pollution of River—Local Government—Sanitary Authority—Neglect of Duty—Damages—Non-feasance—Misfeasance—Continuance of Injury—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 17, 19, 299

RIVER—*continued.*

—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

The river Derwent was polluted by sewage from (1) old sewers into which householders of Derby had for more than twenty years discharged their sewage; (2) sewers inherited by the defendants, the corporation of Derby, from their predecessors, into which householders had by virtue of their statutory rights made connections; (3) sewers laid by the defendants themselves; (4) additional sewage arising from the conversion of privies into water-closets under directions given by the defendants. The plaintiffs owned Elvaston Castle and estate situated on the river about five and a half miles below Derby, and brought this action for an injunction to restrain the defendants from polluting the river so as to cause a nuisance; damages for the silting up of a lake fed from the river by a watercourse which had to be stopped up in 1902; the loss of a water-wheel which had been worked by the watercourse, and the expense of replacing it by an engine; pollution to a well into which water percolated from the lake; depreciation of a house on the bank of the river and to the castle; the expense of obtaining a new water supply; and for injury to the fishing. In 1898 an order was made in the Derbyshire County Court, in an action brought by the county council, that the defendants should abstain from polluting the river contrary to the Rivers Pollution Prevention Act, 1876. By the Derby Corporation Act, 1901, the defendants obtained the necessary powers, and they had now commenced to construct sewerage works for the whole of their area:—

Held, that, inasmuch as the householders had obtained in the first two classes of sewage prescriptive rights which could not be interfered with by the defendants, an order had been made under the Rivers Pollution Act of 1876, and the defendants were taking steps to remove the nuisance, no injunction ought to be granted; that the action would not lie against the defendants for non-feasance or neglect of duty under the Public Health Acts; the plaintiffs' remedy against them in that respect was by complaint to the Local Government Board under s. 299 of the Public Health Act, 1875; s. 17 of that Act must be read only as a proviso; and s. 19 did not apply to the present case; that the action would lie against the defendants for damage caused by acts which they had done themselves; that this did not make the defendants liable for the whole of the damage; that the plaintiffs could recover damages for the expense of procuring a new water supply and engine, and for the injury to the house and the fishing; they could not recover for injury to the amenities of the castle nor for the silting up of the lake, for they ought to have excluded the water when they found it was polluted.

Continuance of injury under s. 1, sub-s. (*a*), of the Public Authorities Protection Act, 1893, does not mean damage inflicted once and for all which continues unrepaired, but a new damage recurring day by day in respect of an act done it may be once and for all at some prior time, or repeated it may be from day to day; under that sub-section an action may be instituted within

RIVER—*continued.*
six months of the ceasing of the continuing injury; therefore the plaintiffs were entitled to recover for a greater period than six months and up to the six years limited by the Statute of Limitations. EARL OF HARRINGTON *v.* DERBY CORPORATION - - - Buckley J. 205

ROAD—County council—Maintenance and repair—Embankments—Retaining and supporting walls - - - 336
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RULES OF SUPREME COURT:—
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—— —— r. 32 (a) - - - - 96
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—— Order XVII., r. 4—*Change of Parties by Death, &c.* - - - - 677
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—— Order XIX., r. 10—*Pleading Generally* 677
See PRACTICE. 2.
—— Order XXVIII., rr. 1, 10—*Amendment* 677
See PRACTICE. 2.
—— Order XXXI., rr. 14, 15 - - 505
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See PRACTICE. 1.
—— Order LXVII., rr. 4, 5—*Service of Orders, &c.* - - - - - 677
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SALE—Vendor and purchaser.
See under VENDOR AND PURCHASER.

SCHOOLS—*Public Elementary School—Non-provided School—Trust Deed—Old Managing Body—Master—Contract—Dismissal—New Managing Body—Foundation Managers, Action against—"Appointed Day," Notice of Dismissal given before but expiring after—Local Education Authority—Consent to Dismissal—Parties—Misjoinder—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-s.* 1 (*c*).

Sect. 7, sub-s. 1 (*c*), of the Education Act, 1902, which requires the consent of the local education authority to the dismissal of a teacher in a non-provided public elementary school, has no application to a case where, a teacher having been appointed by the old managing body of such a school, they, before the Act comes into operation on "the appointed day" under s. 27, have given him three months' notice in writing terminating his engagement pursuant to the terms of their contract with him, and that period expires after the appointed day.

A plaintiff who, prior to the Education Act, 1902, has entered into a contract with the old managing body of a non-provided public elementary school cannot maintain an action to enforce his contract against the new managing body appointed under s. 6, sub-s. 2, of the Act, where that new managing body does not include the original contracting parties.

Decision of Kekewich J. affirmed. JONES *v.* HUGHES - - - - - C. A. 180

SECRETARY—Receipt—Authority to bind company - - - - 646
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SERVANT—Master and.
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SERVICE—Amended writ—Re-service—Personal service—Non-appearing defendant—Discretion of Court - 677
See PRACTICE. 2.

SETTING ASIDE—Compromise—Family solicitor—Common agent—Mistake of law or fact - - - - - 704
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—— Judgment creditor—Garnishee order absolute—Mistake - - - 432
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SETTLED ESTATE.
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SETTLED LAND—*Compound Settlement—Settlement by Will—Subsequent Settlement of other Land to same Uses subject to Incumbrance—Discharge of Incumbrance—Appointment of Trustees of Compound Settlement for Purposes of Settled Land Acts—Definition of such Trustees—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 8; *s.* 45, *sub-s.* 1—*Settled Land Act*, 1890 (53 *&* 54 *Vict. c.* 69), *ss.* 11, 16.

A testator by his will dated in 1870 devised a residential estate in settlement. In the midst of and surrounded by the estate and near to the mansion-house there was a smaller property which belonged to other persons. The tenant for life under the will purchased this property for 7800*l.*, and, having mortgaged it for 7000*l.*, himself providing the balance, he by deed in 1904 settled it on the subsisting uses of the will, but subject to the mortgage and to repayment to himself of his costs, charges, and expenses arising out of the transaction. It was proved that the acquisition of this additional property was most desirable and beneficial. Neither in the will nor in the deed of 1904 was any general power of sale conferred on the trustees of those instruments, but the deed contained a proviso that the trustees thereof should have power, by sale or mortgage of the property thereby assured, to raise the amount of the costs, charges, and expenses above referred to. The tenant for life applied to the Court for its sanction to his raising the amount of the incumbrance and costs, charges, and expenses by a mortgage of the entirety of the estate, and that the trustees of the deed of 1904 might be appointed trustees for the purposes of the Settled Land Acts of the settlement created by the will and the deed of 1904:—

Held, following the decision of Byrne J. in *In re Lord Stafford's Settlement and Will*, [1904] 2 Ch. 72, that the trustees of the deed of 1904 ought to be appointed trustees of the compound settlement for the purposes of the Settled Land Acts, as otherwise there would be no one to whom notice could be properly and adequately given under s. 45, sub-s. 1, of the Settled Land Act, 1882:

Held, further, that the proviso contained in the deed of 1904 had not the effect of making the trustees of that instrument trustees for the purposes of the Settled Land Acts, as those Acts

SETTLED LAND—*continued.*

contemplated trustees having a general and not a limited power, that is, a power exercisable at any time and for any purpose, and not a power exercisable in a contingency and for a particular purpose.

The application was therefore granted.

The judgment of Byrne J. (unreported, but referred to, [1904] 2 Ch. at p. 74) in the case above cited more fully referred to by Kekewich J. *In re* COULL'S SETTLED ESTATES **Kekewich J. 712**

2. —— *Mines—Reservation of Mining Rights—Support to Surface—Tenant for Life—Mining Lease—Lease of Power to let down Surface—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 10 (*iv.*); *s.* 6; *s.* 7, *sub-ss.* 2, 3.

A tenant for life of settled land has power under s. 6 of the Settled Land Act, 1882, to grant a lease of a right to let down the surface of the land by mining operations.

By his marriage settlement Sir G. Sitwell conveyed land of which he was owner in fee to uses under which he was now tenant for life. The deed contained an exception from the conveyance of all mines under the land in question with power to work the same; any person exercising these reserved rights was to make reasonable compensation to the trustees of the settlement for all damages caused to the inheritance, and also to the persons for the time being entitled to the surface of the land for damage to things upon the surface:—

Held, that Sir G. Sitwell had no power under the exception to authorize lessees to work the mines so as to let down the surface of the settled land; but that as tenant for life he could under s. 6 of the Settled Land Act, 1882, grant them a lease of a right to do so. SITWELL *v.* EARL OF LONDESBOROUGH - - **Warrington J. 460**

—— Bonds bearing interest out of profits—Deficiency in interest—Sale of bonds—Tenant for life and remainderman **734**
See COMPANY. 1.

—— Fixtures—Right of removal—Intention to improve inheritance - - **406**
See LANDLORD AND TENANT. 2.

—— Tenant for life—Capital or income—"Residuary trust funds"—Wasting securities—Enjoyment in specie - **233**
See WILL. 11.

SETTLED PROPERTY.
See under SETTLED LAND.

SETTLEMENT—*Condition—Validity—Restraint of Marriage—Forfeiture on Marriage at any Time without Consent of Named Persons—Condition subsequent—Gift over—Practice—Parties—Representation of Unborn Children—Trustees—Rules of Supreme Court*, 1883, *Order XVI., r.* 32 (*a*).

A condition subsequent in partial restraint of marriage, e.g., a condition providing for the forfeiture of interests, given by a settlement to a daughter of the settlor and her children, upon the marriage of the daughter at any time without the consent of named persons, is valid and enforceable if it be accompanied by a gift over of the fund on marriage without the required consent.

Decision of Warrington J. affirmed.

The validity of such a condition was settled

SETTLEMENT—*continued.*

in *Dashwood* v. *Lord Bulkeley*, (1804) 10 Ves. 230, and *Lloyd* v. *Branton*, (1817) 3 Mer. 108; 17 R. R. 33, and earlier cases, and those decisions cannot now be questioned.

Per Byrne J.: The Court has no power to appoint a person to represent a class of which there is no member in existence, e.g., unborn children.

Upon a summons to determine the construction and effect of a settlement, unborn children who take an interest under the trusts are sufficiently represented by the trustees. *In re* WHITING'S SETTLEMENT. WHITING *v.* DE RUTZEN **C. A. 96**

2. —— *Covenant to settle After-acquired Property—Property purchased with Accumulations of Income.*

Property purchased with the savings of a wife's income under settled property is not within a covenant by her in her marriage settlement to settle property to which she may thereafter become entitled.

Finlay v. *Darling*, [1897] 1 Ch. 719, followed.

In re Bendy, [1895] 1 Ch. 109, not followed. *In re* CLUTTERBUCK'S SETTLEMENT. BLOXAM *v.* CLUTTERBUCK - - - **Buckley J. 200**

3. —— *Covenant to settle Wife's After-acquired Property—Construction—"Become entitled"—Vesting in Interest—Vesting in Possession—Property vested in Wife in Reversion before Marriage and falling into Possession during Coverture.*

By a marriage settlement made since the coming into operation of the Married Women's Property Act, 1882, it was agreed and declared that all property to which the wife during her then intended coverture should "become entitled" should be vested in the trustees of the settlement upon trust for sale and conversion, subject to a proviso forbidding the trustees to sell any property of a reversionary nature during the lives of the husband and wife without their consent:—

Held, that property to which the wife was entitled in reversion at the date of the marriage would not, in the event of its falling into possession during the coverture, be included in the covenant.

In re Clinton's Trust, (1872) L. R. 13 Eq. 295, discussed. *In re* BLAND'S SETTLEMENT. BLAND *v.* PERKIN - - - - **Kekewich J. 4**

4. —— *Power—Appointment—Perpetuity—Election.*

When a testamentary appointment fails for infringing the rule against perpetuities, persons taking in default of appointment are not bound to elect between their interests in the settled fund and interests in the appointor's own property given to them by the will.

In re Bradshaw, [1902] 1 Ch. 436, not followed. *In re* BEALES' SETTLEMENT. BARRETT *v.* BEALES - - - **Warrington J. 256**

5. —— *Power to appoint in favour of a Particular Class—Donee of Power herself a Member of the Class—Right of Donee to appoint to herself—Construction of Settlement.*

Under a settlement the trust funds in a certain event were to be held in trust for such persons and purposes and in such manner as the settlor should by deed or will appoint, so only that every

SETTLEMENT—*continued.*

such appointment should be made to or in favour of one or more of a specified class of persons, and in default of appointment in trust for the members of the class equally. The settlor was herself a member of the class:—

Held, that it was competent to the settlor under the power to appoint the trust funds to herself. TAYLOR *v.* ALLHUSEN **Kekewich J. 529**

6. —— *Real Estate — Limitations — Equitable Estate in Fee—No words of Inheritance—Will Power — Appointment void for Remoteness — Election.*

A limitation in a deed of a trust of real estate for a class of children without any words of inheritance may confer the equitable fee upon them where the intention to do so is expressed or sufficiently shewn on the face of the instrument.

By a marriage settlement dated in 1831 real estate was conveyed to a trustee upon trust for the husband and wife successively for life, and after their deaths upon trust to convey and transfer the trust estate between or among the children of the marriage as the husband and wife should jointly appoint, and in default as the survivor should appoint, and in default to all the children of the marriage who attained twenty-one, or married, in equal shares. The settlement contained a provision that no child taking under any appointment should receive anything more until all the other children had received shares equal in value to the appointed share; a power of advancement up to one-half of the value of each child's share; and a gift over if no child attained a vested interest:—

Held, that there was on the face of the instrument amply sufficient indication of an intention that the children should take equitable interests in fee simple.

In re Tringham's Trusts, [1904] 2 Ch. 487, followed.

The husband, having survived his wife, by will, in exercise of the power given him by this settlement, appointed shares of the property to his three daughters for life, with remainder to their respective children, and gave his daughters interests in property of his own:

Held, that, the appointments being void for perpetuity, no case of election was raised by the will.

In re Bradshaw, [1902] 1 Ch. 436, not followed. *In re* OLIVER'S SETTLEMENT. EVERED *v.* LEIGH **Farwell J. 191**

7. —— *Trust for Wife if she shall "survive" her "Coverture"—Determination of Coverture by Decree for Dissolution of Marriage—Construction—Divorce.*

By a marriage settlement the father of the wife covenanted that his executors after his death should pay to the trustees of the settlement the sum of 10,000*l.*, which was to be held, in the event, which happened, of there being no issue of the marriage, in trust for the wife, her executors, administrators, and assigns, "if she shall survive her now intended coverture, but if she shall die during her now intended coverture" then in trust for the father, his executors, administrators, and assigns.

The marriage was dissolved by decree absolute on the petition of the husband. Both the spouses were living. The father had died:—

Held, that the words "survive her now intended coverture" could not be read as equivalent to "survive her husband," and that as the coverture had determined by the divorce the lady had "survived" the coverture, and was, therefore, absolutely entitled to the 10,000*l.* *In re* CRAWFORD'S SETTLEMENT. COOKE *v.* GIBSON **Kekewich J. 11**

8. —— *"Trusts aforesaid"—Life Interest to Unmarried Niece with Reversion to Children—Power to appoint Life Interest to surviving Husband—Gifts over in Default of Children—Remoteness—Independent alternative Trusts—Validity of ultimate Trusts—Construction of Settlement.*

A testatrix, after settling a sum of money upon trusts for M. (a married niece) for life with power to appoint the income to any husband who might survive her for his life, with remainder to her children, if any, at twenty-one, settled three other sums of money upon such trusts and with such powers in favour of E., B., and J. (three unmarried nieces) and their respective husbands and children, if any, as should correspond with the preceding trusts and powers in favour of M. and her husband and children, if any. And the testatrix directed that, in case none of her said nieces should have any child who should become entitled to the said principal sums under "the trusts aforesaid," then all the said principal sums should, "subject to the preceding trusts," be held in trust for a class of persons, ascertained within due limits, in such shares, &c., as the last survivor of the four nieces should by will appoint. M. died without having had a child, and E., B., and J. all died unmarried; and B., the last survivor of them, by her will executed the power in favour of the class mentioned in the ultimate trust. On the death of B., the question arose whether the ultimate trust or gift was not void for remoteness on the ground that, if the power to appoint to husbands had been exercised, the period for ascertaining the class in the ultimate gift might have infringed the rule against perpetuities, because the husbands need not necessarily have been born in the lifetime of the settlor:—

Held, that the words "the trusts aforesaid" in the ultimate gift were not restricted to the previous trusts actually declared, but would include a trust created by the exercise of the power to appoint to husbands:

But, *held*, that it was a case of alternative independent gifts within the principle of *Monypenny* v. *Dering*, (1852) 2 D. M. & G. 145, and *Longhead* v. *Phelps*, (1770) 2 W. Bl. 704; and that, inasmuch as the power in favour of husbands was never exercised, the ultimate gift in the events which had happened was valid, and therefore the appointment made by B. was good. *In re* BOWLES. PAGE *v.* PAGE - **Farwell J. 371**

—— Bankruptcy of donee of power of appointment — Capacity of trustee to release power - - - - - 94
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—— Power of appointment.
See under POWER OF APPOINTMENT.

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—— Settled land.
See under SETTLED LAND.

SHAREHOLDERS AND SHARES.
See under COMPANY.

SOLICITOR — *Costs — Taxation — Public Body—Right to elect—Practice—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, August*, 1882, *r.* 6.

The right of a solicitor under rule 6 of the general order under the Solicitors' Remuneration Act, 1881, to elect to charge according to the old system as altered by Sched. II. to the order, instead of by scale, is not taken away by the fact that his clients are a public body or persons in a fiduciary capacity; nor is it the duty of public bodies or persons in a fiduciary capacity to prevent their solicitors from so electing.

A school board instructed a solicitor to act for them in the matter of a purchase of a school site for 350*l.* The solicitor duly signified to the board his election under rule 6 of the general order to charge on the old system as altered by Sched. II. The board consented. The matter was completed, and the solicitor sent in a bill for 50*l.* 2*s.* On taxation the taxing master reduced the bill to 13*l.*, the amount of the scale charge and disbursements, and stated in answer to objections that the school board, being a public body charged with the administration of public funds, were in a fiduciary position, and it was their duty not to employ a solicitor who insisted on the more expensive mode of payment:—

Held, that no such duty was cast on a public body or persons in a fiduciary position, and that the bill must be referred back to be taxed according to the solicitor's election. *In re* EVANS (A SOLICITOR) - - - **Farwell J. 290**

2. —— *Costs — Taxation — Third Party — Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.

Where a third party obtains an order to tax a bill under s. 38 of the Solicitors Act, 1843, the bill must be taxed as between the solicitor and the client, and not as between the solicitor and the third party, though items outside the scope of the third party's liability must as against him be disallowed.

The office practice certified by the masters in *In re Longbotham & Sons*, [1904] 2 Ch. 152, so far as inconsistent with this principle, is erroneous.

In re Brown, (1867) L. R. 4 Eq. 464, *In re Negus*, [1895] 1 Ch. 73, *In re Gray*, [1901] 1 Ch. 239, and *In re Longbotham & Sons*, [1904] 2 Ch. 152, followed. *In re* COHEN & COHEN
Swinfen Eady J. 345

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—— Fraudulent solicitor — Non-production of title-deeds—Postponement of legal mortgage - - - - - **632**
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TRADE-MARK—*Registration—Invented Word—"Absorbine"—Patents, Designs, and Trade Marks Acts*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *and* 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 1.

The word "Absorbine," as applied to a veterinary preparation for absorbing and removing swellings.

Held (affirming Joyce J., [1904] 1 Ch. 696), to be a mere variation of an existing English word, and therefore not an "invented word" capable of registration. CHRISTY *v.* TIPPER
C. A. 1

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—— Independent alternative trusts—Validity of ultimate trusts—"Trusts aforesaid"
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TRUSTEE—*Overpayments—Adjustment—Trustee also a Beneficiary—Right to impound—Trustee and Cestui que Trust—Administration—Tenants for Life.*

Where a trustee, who was himself one of the beneficiaries, had inadvertently overpaid the other beneficiaries their shares of income, and died before any adjustment had been made:—

Held, that the executors of the deceased trustee were not entitled to recover from the other beneficiaries the amounts so overpaid, or to have accrued or future income impounded till the shares were equalized, by reason of the fact that their testator himself was the person responsible for the mistake that had been made. *In re* HORNE. WILSON *v.* COX SINCLAIR
Warrington J. 76

2. —— *Power to appoint New Trustees—Appointment of Corporation jointly with Individual—Bodies Corporate (Joint Tenancy) Act*, 1899 (62 & 63 *Vict. c.* 20).

A marriage settlement contained a proviso that, if the trustees thereby constituted or either of them, or any trustees or trustee thereby appointed, should die . . . . it should be lawful for the husband and wife to appoint a new trustee or new trustees in the place of the trustee or trustees so dying. One of the trustees having died, the husband and wife proposed to appoint a corporation to be new trustee jointly with the surviving trustee:—

Held, that since the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20) had enabled corporate bodies to hold property in joint tenancy with individuals, the appointment could legally be made under the power. *In re* THOMPSON'S SETTLEMENT TRUSTS. THOMPSON *v.* ALEXANDER - - - Swinfen Eady J. 229

3. — *Practice—Appeal — Will — Construction—Trustees served with Notice of Appeal—Appearance by Counsel—Costs—Taxation.*

Per Romer and Cozens-Hardy L.JJ.: Although it is the settled practice that trustees served with notice of an appeal upon the construction of a will are entitled to their costs of appearance by counsel, yet, in taxing their costs of appearance, the taxing master should have regard to the position of the trustees, and especially whether it was such that, at the hearing of the appeal, their assistance would probably be required by the Court:—

Per Vaughan Williams L.J.: Trustees served with notice of appeal and holding a merely neutral position, without any intention of taking part in

TRUSTEE—*continued.*

the argument, ought not to appear by separate counsel on the appeal. CARROLL *v.* GRAHAM
C. A. 478

4. — *Purchase by Trustee—Leaseholds forming part of Trust Estate—No Right of Renewal—Reversion purchased by Trustee—Ownership of the Fee—Trust—Partner.*

The doctrine that wherever the reversion on a lease which forms part of a trust estate is purchased by the trustee of the lease the purchase is for the benefit of the trust estate applies only to leaseholds which are renewable by custom or contract. Therefore, if a trustee of a lease which is not thus renewable buys the reversion on the lease, he may, in the absence of fraud, hold it for his own benefit.

Longton v. *Wilsby*, (1897) 76 L. T. 770, explained and followed. BEVAN *v.* WEBB
Warrington J. 620

5. — *Release — Breach of Trust—Joint and Several Liability—Compromise with one Trustee—Release pro tanto of the others—Right to prove in the Bankruptcy of another Trustee for full amount of Debt.*

Where in an action against trustees for breach of trust a sum is certified to be due from the defendants to the plaintiff, the acceptance by the plaintiff of a payment by one trustee by way of compromise in discharge of his liability does not operate as a release pro tanto of the others; consequently the plaintiff may prove in the bankruptcy of another trustee for the full amount of the certified debt without giving credit for the compromise. EDWARDS *v.* HOOD-BARRS
Kekewich J. 20

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VENDOR AND PURCHASER—*Conveyance—Implied Covenants for Title — Breach—Damages—Defect of Title appearing on Conveyance—Undisclosed Easement—Repayment of Costs of Litigation —Solicitor and Client Costs—Indemnity—Interest —Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7.

The defendant conveyed part of a building estate in fee simple as beneficial owner to the plaintiffs. The plaintiffs had notice both on the face of and outside the conveyance that previous purchasers of parts of the estate had rights of way over a road. As between the plaintiffs and the defendant, however, the former were to take the land discharged from those rights. The conveyance contained no express covenants for title nor any qualification of the implied covenants. The plaintiffs entered on the land and blocked up the road; and a previous purchaser claimed 5000*l.* damages from them for doing so. The plaintiffs gave notice to the defendant and, under protest, went to arbitration. An award was made giving the previous purchaser 510*l.* The plaintiffs still disputed his right, and he brought an action in which, on a special case, the plaintiffs were held liable to pay him the 510*l.* and interest, and the costs of the arbitration proceedings and of the action. They paid these sums, and brought this action claiming from the defendant repayment of the money thus paid and of their own costs of the arbitration and action:—

Held, following *Turner* v. *Moon*, [1901] 2 Ch. 825, that the plaintiffs were entitled to bring an action for damages under the defendant's implied covenants for title; that their knowledge of the previous purchaser's rights did not prevent them from making this claim; that the defendant was liable to indemnify them, and must repay the 510*l.* and interest and the costs which they had paid to the previous purchaser; and must also pay to them subsequent interest on the 510*l.* and their costs of the arbitration proceedings as between solicitor and client; but that he need not pay their costs of the special case. GREAT WESTERN RAILWAY COMPANY *v.* FISHER
Buckley J. 316

2. —— *Rescission—Contract of Sale—Power to rescind where Objection as to Title insisted on—Absence of Title to Mines in Property sold.*

J. and others contracted to sell to H. a villa under a description which would include the mines and minerals under it. The contract provided (clause 13) that if the purchaser should "insist on any objection or requisition as to title which the vendors" should "be unable to remove or comply with," the vendors should be entitled to rescind the contract; and (clause 14) that any misstatement or omission in the particulars should form the subject of compensation.

The abstract shewed that the mines and

VENDOR AND PURCHASER—*continued.*
minerals under the property had been reserved to the grantor by a conveyance to persons under whom the vendors claimed.

The purchaser insisted on a requisition that the vendors' title to the mines and minerals should be furnished:—

Held, that clause 13 did not apply so as to enable the vendors to rescind, and that under clause 14 the purchaser was entitled to a conveyance of the property, excepting the mines and minerals, but with compensation in respect of the excepted property. *In re* JACKSON AND HADEN'S CONTRACT - - - **Buckley J. 603**

3. —— *Restrictive Covenants—Title by Possession—Notice—Acceptance of less than Forty Years' Title—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34.

P. sold land to N. under a contract dated in 1903, which shewed that one of P.'s predecessors in title had acquired a title by possession under the Statute of Limitations. An abstract was delivered which did not shew the existence of any restrictive covenants as to user. N. discovered aliunde that in 1872 the person then in possession of the land, and against whose heirs a title had been acquired by possession, had entered into covenants restricting building upon the land. The vendor had purchased in 1901, and had then accepted a title commencing in 1878. He had no actual notice of the covenants, but would have had notice if he had insisted on and obtained a forty years' title. The purchaser objected to the title on the ground that the land was bound by the covenants. The vendor answered that as he purchased without notice and the title was one by possession the land was not bound:—

Held, that a title acquired by adverse possession is not paramount to, and does not destroy, the equitable right of persons entitled to the benefit of prior restrictive covenants to enforce them against the land; that any purchaser taking less than a forty years' title is fixed with constructive notice of everything of which he would have received actual notice if he had insisted on a full title; and, therefore, the vendor in this case had notice of the covenants; and that a good title was not shewn.

The nature of the right to enforce restrictive covenants discussed. *In re* NISBET AND POTTS' CONTRACT - - - **Farwell J. 391**

4. —— *Title—Will—Investment Clause—Construction—Power to invest in the Purchase of Real Estate—Power to transpose and vary "Securities"—Implied Power to resell purchased Real Estate.*

A testator, who died in 1895, by his will devised and bequeathed his real estate and the residue of his personal estate upon trusts for his wife and children; and the testator, after giving his trustees a discretionary power of sale over his real estate, authorized them to invest any trust moneys in their hands "in the purchase or upon mortgage of freehold or leasehold properties in England . . . . or in or upon the preferential stocks" of certain railway companies, "or in any other investment in or upon which trustees are authorized by law to invest trust funds, with full power to vary and transpose such securities for

VENDOR AND PURCHASER—*continued.*
others of the description hereinbefore authorized." The will contained no express trust or power for reconversion of purchased real estate. In 1896 the trustees out of trust moneys in their hands purchased real estate, and in 1903 contracted to resell the same. The purchaser objected that the trustees had no power under the will to resell the purchased real estate:—

Held, following *In re Rayner*, [1904] 1 Ch. 177, that the testator had used the word "securities" in its wider sense as a synonym for "investments"; and that the power to transpose and vary securities, so read, enabled the trustees to resell the purchased real estate and to give a good discharge for the purchase-money. *In re* GENT AND EASON'S CONTRACT - **Farwell J. 386**

—— Partner's share to co-partner, Sale of one—Duty of purchasing partner—Fiduciary relation - - - - 140
See PARTNERSHIP. 2.

VESTING — Covenant to settle wife's after-acquired property—Construction—"Become entitled" - - - 4
See SETTLEMENT. 3.

VOLUNTARY LIQUIDATION — Agreement of service—Resolution to wind up—Dismissal of servant - - - 357
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VOLUNTARY WINDING-UP OF COMPANY.
See under COMPANY.

WAGERING—Gaming and wagering contract—Interest on sums deposited as cover—Proof for interest - - - 307
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WALLS—County council—Main road—Maintenance and repair—Retaining and supporting walls—Mandatory order - 336
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WASTING SECURITIES—Enjoyment in specie—"Residuary trust funds"—Tenant for life and remainderman - - 233
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WATER—Supply to adjoining district—Sanction of Local Government Board—Contracts
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WIFE.
See under HUSBAND AND WIFE.

WILL—*Annuity—Charge on Land—Specific Devise—Legacy—Testamentary Expenses—Estate Duty—Mixed Fund—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1; *s.* 14, *sub-s.* 1—*Will—Construction—Rent-charge.*

By his will the testator gave to his wife so long as she should remain his widow an annuity of 500*l.*, and he declared that this annuity should be a first charge on all his freehold properties at Greenwich. He gave various legacies, and then devised and bequeathed all his real and personal estate not thereby otherwise disposed of upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses and debts and legacies, and to stand

possessed of the residuary trust moneys upon certain trusts.

The Greenwich property passed to the trustees under the residuary devise:—

Held, that, upon the true construction of the will, the annuity was not a rent-charge, but was a personal annuity secured by a charge on the Greenwich property, and the estate duty on it must be paid by the executors as testamentary expenses.

The statement in Theobald on Wills, 5th ed. p. 442, that "a gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable," is accurate only in cases where, upon the construction of the particular will, the gift must have that effect. *In re* TRENCHARD. TRENCHARD *v.* TRENCHARD

Warrington J. 82

2. —— *Beneficiaries—Conflicting Interests—Legal Rights—Compromise—Agreement—Family Solicitor—Common Agent—Mistake of Law or Fact—Setting aside Compromise.*

A compromise between members of a family of their supposed rights under a will or other document, made after a joint consultation with the family solicitor, he acting as the common agent, is, in general, binding upon all the parties, even though it may not be quite in accordance with their exact legal rights, provided the solicitor has first fully explained to the parties what those rights are. But if any one of the parties has entered into the compromise in consequence of what afterwards proves to have been an erroneous view taken by the solicitor of the facts or of the law, or merely because the solicitor may have considered a compromise would be for the advantage of all parties irrespective of their legal rights, that party may have the compromise set aside.

Decision of Kekewich J. reversed. *In re* ROBERTS. ROBERTS *v.* ROBERTS - **C. A. 704**

3. —— *British Subject's Holograph Will in accordance with Law of Foreign Country in which made—Effect on English Leaseholds—"Personal Estate"—Lord Kingsdown's Act (Wills Act*, 1861) (24 & 25 *Vict. c.* 114), *ss.* 1, 4.

Sect. 1 of Lord Kingsdown's Act provides that every will made out of the United Kingdom by a British subject (whatever may be his domicil) "shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate" if made according to the forms required by the law of the place where the same was made:—

Held, that "personal estate" includes leaseholds, and that when the will of a British subject made abroad in the form required by the law of the place has been proved in England, the beneficial interest in the leaseholds passes to the person pointed out in the will as the donee of that interest, provided the bequest does not infringe the law of England, e.g., that relating to accumulations or perpetuity. *In re* GRASSI. STUBBERFIELD *v.* GRASSI - **Buckley J. 584**

4. —— *Charge of Debts and Funeral and Testamentary Expenses on Realty—Gift of all Personalty to another Donee—Non-exoneration of Personalty.*

The personal estate being the primary fund for payment of a testator's debts and funeral and testamentary expenses, and exonerated therefrom only where the intention to exonerate is shewn by express words or necessary implication from the whole will, it is insufficient, in order to establish exoneration, to find that the real estate is merely charged with the payment.

A testator gave all his personalty to K., and devised certain real estate to his trustees "subject to the payment of" his "just debts and funeral and testamentary expenses" to K. and other persons. The testator also in his will expressed the wish that none of his real estate should be sold whilst there was any male descendant of his own surname:—

Held, that the personalty was not exonerated from the payment of the debts and funeral and testamentary expenses.

Greene v. *Greene*, (1819) 4 Madd. 148; 20 R. R. 284; *Michell* v. *Michell*, (1820) 5 Madd. 69; 21 R. R. 280; *Blount* v. *Hipkins*, (1834) 7 Sim. 43; 40 R. R. 74; *Lance* v. *Aglionby*, (1859) 27 Beav. 65; *Gilbertson* v. *Gilbertson*, (1865) 34 Beav. 354; and *Kilford* v. *Blaney*, (1885) 31 Ch. D. 56, distinguished. *In re* BANKS. BANKS *v.* BUSBRIDGE - - **Buckley J. 547**

5. —— *Charity, Gift to—Condition Precedent — Remoteness — Perpetuity — Postponement of Enjoyment — Reserve Fund — Uncertain Event—Validity of Gift—Will—Construction.*

A testator gave his residuary real and personal estate to a trustee upon trust thereout to form a "reserve fund" for the purposes hereinafter mentioned, and to pay the balance of the income of his said residuary estate, after payment of outgoings, to his niece during her life, and after her death to pay such income (after payment into the said reserve fund every quarter of a year of 10 per cent. of such income, and also certain outgoings) by equal monthly payments to three annuitants for their respective lives, who should be poor inhabitants of M. And the testator directed that "the said annuities shall not become payable until the said reserve fund shall amount to 400*l.*," and that the said reserve fund should be invested and only used in case of dire need, but be always kept up at 400*l.*; and that if, after the said annuities were payable, it should exceed 400*l.*, then the overplus might be used either to increase the amounts of the said three annuities or to create another annuity.

The testator's net residue consisted solely of real estate, and during the lifetime of the niece, the tenant for life, there was no income available for forming a reserve fund. On the death of the niece questions arose upon the construction of the will—(1) whether the charitable gifts of the annuities failed by reason of the direction that the annuities should not come into operation until after the reserve fund amounted to 400*l.*, which might be at a date beyond the limits of the rule against perpetuities; and (2) whether there had been an effectual devotion of the "reserve fund" to charitable purposes:—

Held, by the Court of Appeal (reversing Buckley J.), that, subject to the life estate, the residue had been effectually devoted to charity as from the testator's death, and that the direc-

WILL—*continued.*

tion to postpone the payment of the annuities until the reserve fund reached 400*l.* was not a condition precedent to the charitable gift coming into effect, but was only a direction as to the particular application of the charitable fund and intended to secure the beneficial working of the charity, and that the case, therefore, fell within the first principle in *Chamberlayne* v. *Brockett*, (1872) L. R. 8 Ch. 206, 211; also that the reserve fund was equally devoted to a charitable purpose. *In re* SWAIN. MONCKTON *v.* HANDS - **C. A. 669**

6. —— *Estate Duty — Legacies given "free from Duty"—Settled Legacy—Settlement Estate Duty—Will made before and Death of Testatrix after passing of Finance Acts*, 1894 *and* 1896—*Deficient Estate—Abatement of Legacies—Incidence of Duties—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5, *sub-s.* 1—*Finance Act*, 1896 (59 *&* 60 *Vict. c.* 28), *s.* 19, *sub-s.* 1—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24—*Will—Construction.*

A testatrix, who made her will in 1893 and died in 1903, bequeathed numerous pecuniary legacies and directed that all the legacies should be paid "free from duty." Her estate was insufficient to pay all the legacies and duties in full:—

Held, following *Lord Advocate* v. *Miller's Trustees*, (1884) 21 Sco. L. R. 709, that the legacy duty payable on each legacy must be treated as an additional legacy and be added to the legacy for the purposes of abatement.

The testatrix by her will settled one of the legacies on certain trusts:—

Held, that the Finance Acts, 1894 and 1896, applied, and that the direction to pay "free from duty" included the settlement estate duty, which must, like the legacy duty, be treated as an additional legacy and be added to the legacy for the purposes of abatement. *In re* TURNBULL. SKIPPER *v.* WADE - - - **Farwell J. 726**

7. —— *Investment by Trustees — Breach of Trust—Power to invest on Freehold or Leasehold Ground-rents — Purchase of Leasehold Ground-rents—Construction of Will.*

A testator bequeathed the residue of his estate to his trustees, upon trust to invest the same on Government securities, "or upon freehold ground-rents, or upon leasehold ground-rents not having less than sixty years unexpired, and held direct from the freeholder."

The trustees were to receive "the dividends, rents, and annual income thereof," and to divide and pay the same unto and equally between the testator's two daughters, for and during their lives. On the death of either of them the corpus of her share was to go to her issue:—

Held, that the above clause authorized the trustees to invest the residue in the purchase of freehold ground-rents or of leasehold ground-rents of the character specified.

Decision of Kekewich J. reversed. *In re* MORDAN. LEGG *v.* MORDAN - - **C. A. 515**

8. —— *Lapse of Legacy—Two Residuary Gifts —Will—Construction.*

Testator, by his will, appointed H. his executor, then gave pecuniary legacies to sixteen persons, including H., bequeathed his watch to a nephew, and then directed that "the remainder of" his "property" should "pass as follows, viz. to be divided amongst" certain named persons in defined shares. The will concluded as follows: "And I appoint my executor my residuary legatee."

Two of the legacies lapsed by death of legatees in the testator's lifetime:—

Held, that the lapsed legacies fell into the first residue and did not go to H. *In re* ISAAC. HARRISON *v.* ISAAC - - **Buckley J. 427**

9. —— *Realty—"What is left"—Life Estate by Implication—Intestacy—Devise after Death of A. to two of several Co-heirs—Construction of Will.*

The rule that a devise of realty, after the death of A., to the heir-at-law of the testator, gives A. a life estate by necessary implication, does not apply when the devise is, after the death of A., to one or more of several co-heirs. In such a case there is an intestacy during the life of A.

Hutton v. *Simpson*, (1716) 2 Vern. 722; S. C. Gilb. Eq. Rep. 115, 120, and Prec. Ch. 439, 452, discussed and explained.

A testator appointed his wife his executor with power to sell all his property and land, and "at her death what is left to be divided between" his two daughters:—

Held, that the words "what is left" meant the "net residue" of the estate after payment of debts and costs of realization, and did not give the wife a life or any other interest in the testator's estate. *In re* WILLATTS. WILLATTS *v.* ARTLEY **Farwell J. 378**

10. —— *Remoteness—Realty—Gift after last Survivor of Tenants for Life to a Class, necessarily ascertainable within due Limits, as Tenants for Life—Estate Tail to last Survivor of Class—Legal Contingent Remainder—Remoteness—Rule against Perpetuities—Construction of Will.*

The rule against perpetuities applies to legal contingent remainders as well as to equitable limitations.

A testatrix devised her real estate to trustees and their heirs upon trust to receive the rents and profits and divide the same as soon as they conveniently could after Lady Day and Michaelmas Day in each year into three equal parts, and pay the same as therein mentioned to A., B., and C., and the survivors and survivor of them during their lives and the life of the survivor; and, after the decease of such survivor, upon trust to pay and divide the said rents and profits, as soon as conveniently could be after the said days thereinbefore appointed, equally amongst all such of the children, born in her lifetime or within twenty-one years of her death, of the said A., B., and C. as should be living on the Lady Day or Michaelmas Day preceding such payment and division; and after the death of all such children, except one, the testatrix devised the said real estate to such surviving child in tail, with remainder over. C. survived A. and B. and died leaving no issue. B. also left no issue; but A. left children who were born within due limits and who survived C.:—

Held, that the estate tail limited to the survivor of the children of A., whether regarded as an equitable limitation or as a legal contingent

WILL—*continued.*
remainder, infringed the rule against perpetuities and was void for remoteness. *In re* ASHFORTH. SIBLEY *v.* ASHFORTH - - - **Farwell J. 535**

11. —— *Tenant for Life and Remainderman —Capital or Income—Conversion—Power to postpone Conversion*—"*Residuary Trust Funds*"—*Unauthorized Securities — Wasting Securities — Enjoyment in Specie—Will—Construction.*

The testator devised and bequeathed all his real and personal estate not by his will otherwise disposed of to trustees upon trust to sell and convert the same, with power to postpone conversion as long as the trustees thought proper and to retain any investments subsisting at his death, whether of the kind thereinafter authorized or not, and out of the proceeds to pay debts and legacies, and at the discretion of the trustees to invest the residue and to stand possessed of the residuary trust moneys and the investments for the time being representing the same (thereinafter called "the residuary trust funds") in trust to pay the income thereof to his wife during her life.

At the time of his death the testator was possessed of preference and ordinary shares in a coal-mining company. The ordinary shares, although not of a wasting character, were not authorized by the investment clause in the will. The trustees therefore sold some of them, and proposed to sell more on a favourable opportunity. They declined to pay to the widow in the meantime the full dividends on the ordinary shares thus retained:—

Held, that, in the absence of any express or implied gift of the income pending conversion, the widow was entitled only to interest at 3 per cent. on the value of the ordinary shares at the testator's death, and the rest of those dividends must be invested. This rule was well settled, and applied to unauthorized securities whether they were of a wasting character or not.

Bulkeley v. *Stephens*, (1863) 3 N. R. 105, dissented from. *In re* CHAYTOR. CHAYTOR *v.* HORN - - - - **Warrington J. 233**

—— Charity—Repair of burial grounds—Restriction to members of a particular sect
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—— Election to take property as against will—Amount of compensation, at what date to be ascertained - - - **16**
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—— Investment clause—"Securities," Power to transpose and vary—Implied power to resell purchased real estate - **386**
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—— Power of appointment.
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—— Trustees.
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—— "Become entitled" - - - **4**
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—— "Copy" - - - - - **519**
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—— "Coverture" - - - - **11**
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—— "free from Duty" - - - **726**
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—— "Personal estate" - - - **584**
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—— "Residuary trust funds" - - **233**
See WILL. 11.

—— "Securities" - - - - **386**
See VENDOR AND PURCHASER. 4.

—— "Shares" - - - - **419**
See COMPANY. 6.

—— "Survive" - - - - **11**
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—— "Trusts aforesaid" - - - **371**
See SETTLEMENT. 8.

—— "Unreasonably withheld" - - **456**
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—— "what is left" - - - - **378**
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